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# REPORTS OF CASES

DECIDED IN THE

## COURT OF QUEEN'S BENCH,

BY

H. C. W. WETHEY,

BARRISTER-AT-LAW AND REPORTER TO THE COURT.

---

CHRISTOPHER ROBINSON, Q.C.

EDITOR.

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VOL. XXXVII.

CONTAINING THE CASES DETERMINED  
FROM EASTER TERM, 38 VICTORIA, TO HILARY TERM, 39 VICTORIA,  
WITH A TABLE OF THE NAMES OF CASES ARGUED,  
A TABLE OF THE NAMES OF CASES CITED,  
AND A DIGEST OF THE PRINCIPAL MATTERS.

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TORONTO :  
ROWSSELL & HUTCHISON.

1876.

REPORTS OF CASES

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COURT OF QUEBENS BENCH

JUDGES

H. W. RUSSELL

CHRISTOPHER W. RUSSELL

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JUDGES  
OF THE  
COURT OF QUEEN'S BENCH

DURING THE PERIOD OF THESE REPORTS.

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THE HONORABLE ROBERT ALEXANDER HARRISON, C. J.

“ “ JOSEPH CURRAN MORRISON, J.

“ “ ADAM WILSON, J.

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*Attorney-General:*

THE HONORABLE OLIVER MOWAT.





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REPORT OF CASES  
IN THE  
COURT OF QUEEN'S BENCH.

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EASTER TERM, 38 VICTORIA, 1875,

*From May 17th to June 5th.*

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*Present :*

THE HON. WILLIAM BUELL RICHARDS, C.J.

“ “ JOSEPH CURRAN MORRISON, J.,

“ “ ADAM WILSON, J.

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WEAVER V. HENDRICKS ET AL.

*Trespass quare clausum fregit—General issue—Effect of.*

Where the plaintiff declared for a trespass to his land described as being composed of part of lot 10, of which he was and had for a long time been in possession, and the defendants contended that the place where the trespass was committed, though enclosed by the plaintiff, was in fact part of the road allowance, which they were authorized by the corporation to open: *Held*, that this defence was admissible under a plea of not guilty, the question raised by such issue being, whether the defendant had committed a trespass on the land described.

DECLARATION. First count: trespass *quare clausum fregit* on certain lands of the plaintiff, in the township of Murray, in the county of Northumberland, composed of the westerly part of lot ten, in the first concession of the said township of Murray, abutting and adjoining the western boundary of the said lot ten, and in breaking down and destroying the fruit trees, &c., of great value.

Second count: the same as the first, except that the land was described as being composed of the easterly part of lot



eleven in the first concession of Murray, abutting on the west upon land now in the occupation of the defendant John F. Hendricks, and abutting and adjoining the eastern boundary of said lot eleven; with an allegation of damage as before.

Pleas 1: Not guilty, to the whole declaration.

The cause was tried before Morrison, J., at the Fall Assizes of 1874, at Cobourg.

At the trial the plaintiff shewed that he had been in possession of lot ten in the first concession of Murray for twenty-one years. There was an ordinary allowance for road along the west limit of plaintiff's lot. The trespass was the taking down and removing of the fence between the plaintiff and the road allowance, and portions of the cross fences intersecting it. The plaintiff's witnesses stated the damage to be \$50, and the cost of rebuilding the fences \$100.

For the defence evidence was given that the person who took down the fence did not think they went off the road allowance. The defendants' contention was that the road allowance was within the plaintiff's fence.

Here the plaintiff's counsel objected to the evidence, and the learned Judge drew the attention of the defendants' counsel to the fact that the only plea on the record was, not guilty, and that if he intended to rely on the title to the land of which the plaintiff had possession he should have other pleas on the record. The defendants' counsel urged that under "not guilty" he could shew that the plaintiff was in possession of the road allowance: that a by-law had been passed by the corporation of Murray to open it; and that the defendants were acting under the authority of that by-law. His lordship rejected the evidence, unless the defendants' counsel added other pleas, which he declined to do. The damages were agreed to at \$50, and leave was reserved to move against the ruling.

In Michaelmas Term, November 19, 1874, *J. W. Kerr* obtained a rule *nisi* to set aside the verdict, and for a new

trial pursuant to leave reserved, on the following grounds :

1. For misdirection of the learned Judge who tried the cause, in ruling that evidence was not admissible under the plea of not guilty to shew that the trespasses complained of were not committed on lot ten, or lot eleven, but on the road allowance between said lots.

2. For the improper rejection of evidence to shew where the said trespasses were committed.

3. Or for a new trial on the merits, on grounds disclosed in affidavits filed, and pursuant to leave reserved.

The affidavits on which the rule was moved were made by the defendants' attorneys, and were to the effect that they were prepared to shew by surveyors and other evidence that the alleged trespass was not committed on lot 10, or on lot 11, but on the allowance for road between these lots; and that the learned Judge who presided at the trial refused to hear such evidence under the plea of not guilty. They both stated their belief that the evidence would clearly shew that the alleged trespasses were committed on the road allowance, and that consequently the plaintiff's action ought not to be sustained. They further stated that they had submitted the pleas to counsel, who had advised them that the plea of not guilty was the proper plea to raise the question whether the alleged trespass was on the road allowance, or on lot 10, or on lot 11.

In reply, the plaintiff's attorney filed his own affidavit, stating that the evidence on the trial shewed that there was a road allowance between lots 11 and 12; and that the trespasses were committed over a greater area than would be occupied by said road allowance, and on land enclosed and in the occupation of the plaintiff.

He also filed an affidavit made by the plaintiff's son, shewing his father to have been in possession of the west half of lot 10, in the first concession of Murray, and part of the easterly part of lot 11, in the said township, for over twenty years previous to the trespasses complained of in this cause : that the said land so occupied and

in possession of the plaintiff was enclosed during the whole of said period of over twenty years, by a fence: that the trespasses complained of were committed on both said lots 10 and 11, and on the parts so in possession of the plaintiff and enclosed: that he saw the defendants commit the trespasses by throwing down the fences running between the land occupied by the plaintiff and the public road between the plaintiff's land and that part of 11 occupied by John F. Hendricks, and also by throwing down the cross fence of the plaintiff running easterly from the first mentioned fence over 130 feet: that the defendants had not a good defence on the merits, as he believed; and that the trespasses extended from west to east over land occupied by the plaintiff, a distance of over 130 feet.

June 1, 1875. *C. Francis* shewed cause. The evidence shewed that the trespasses extended over the plaintiff's enclosure a much greater distance than any allowance for road and the fence. As the plaintiffs must have a verdict for something, a new trial ought not to be granted.

*Bethune* and *J. W. Kerr*, contra. Under rule 19, referred to in *Harrison's* C. L. P. Act 729, the plea of not guilty puts in issue the trespass having been committed on the close described. Any person properly in occupation may bring trespass for injury to fences, &c., on the road allowance, but the place must be properly described. If the plaintiff had declared for trespass on the road allowance, or to his close, giving a description which would cover the road allowance, defendants might have justified. It cannot be assumed now, as defendants' witnesses were not heard, that they went beyond the road allowance: *Tyson v. Little*, 8 U. C. R. 434. In *Marstell v. Anderson*, tried before Mr. Justice Adam Wilson, at Cornwall, it was held that the plaintiff must shew the trespass on the lot described, and defendant might under not guilty shew it was a road allowance or another lot. In *Hoover v. Sabourin*, tried before Chief Justice Hagarty, at the Welland Spring Assizes of 1873, a new trial was granted. See also *Manary v. Dash et al.*, 23 U.C. R. 580.

June 19, 1875. RICHARDS, C. J., delivered the judgment of the Court.

Rule 18, of Trinity Term, 1856, referred to by Mr. Bethune, reads thus :

“ In actions of trespass to land, the close or place in which, &c., must be designated in the declaration by name, or abutments, or other description, in failure whereof the plaintiff may be ordered to amend with costs, or give such particulars as the Court or Judge may think reasonable.”

Rule 19 is as follows : “ In actions of trespass to land, the plea of ‘ not guilty ’ shall operate as a denial that the defendant committed the trespass alleged *in the place mentioned* ; but not as a denial of the plaintiff’s possession, or right of possession of that place, which, if intended to be denied, must be traversed specially.”

Now, here, the defendants contend, that the place in which the plaintiff alleges the trespass in the first count was committed was the westerly part of lot ten. That is the place mentioned. They wished to be allowed to shew that the trespass they committed was not on lot ten at all, but on the allowance for road beside lot ten, and they were not allowed to do this. The same statement in effect applies to the second count merely *mentioning* the place as part of lot eleven.

There is no doubt that in this Province the Judges have, at *nisi prius*, ruled both ways in this matter. Some of the cases referred to by Mr. Bethune are within the personal knowledge of some of the members of the Court. Whatever our individual views may be, we all feel inclined to adhere to an express decision on the point made by either of the Courts sitting in Banc. On referring to the Judges of the Court of Common Pleas I have obtained the following note of the case of *Hoover v. Sabourin* :

*Hoover v. Sabourin*, tried before Hagarty, C. J., at the Welland Assizes, April, 1873. Trespass *q. c. f.*, on lot 27, sixth concession of Wainfleet, described by metes and bounds.

Plea : Not guilty.



The plaintiff proved that he was the owner of lot 27, and that he was in possession of it, and there was a fence between his lot and 26, and that defendant cut wood ten or fifteen rods on his, plaintiff's, side of the farm.

Defendant proposed to prove that he was in possession of lot 26, claiming title, but was not prepared to prove a paper title, and proposed to prove that the act of trespass was committed on lot 26 and not on lot 27.

It was objected that under the plea of not guilty defendant could not shew that the trespass was committed on other land of which the plaintiff was not the owner. The learned Chief Justice ruled against the defendant. Defendant contended that the plaintiff must prove that the trespass was on the land mentioned in the declaration, and that he might shew it was not on such land.

The rule for a new trial was made absolute in Trinity Term, 1873.

Mr. Justice Gwynne's note of the judgment in granting the new trial is to the effect that he had no doubt that what was put in issue in the case was not whether the defendant had committed a trespass on a piece of land, whatever called, in plaintiff's possession; but whether a trespass was committed on lot 27, the possession of which by the plaintiff, not having been denied, was admitted.

Even if it were not for this decision, we would have felt inclined to grant a new trial, to enable the defendants to set up the real defence, and the only question then would have been as to the terms on which the new trial should be granted, whether on payment of costs or not.

But, after this decision of the Court of Common Pleas, we do not feel warranted in making the defendants pay the costs, as a condition on which they are to obtain the new trial. But, inasmuch as the plaintiff seems confident that he can shew a trespass far beyond any possible justification that can be set up, we think the costs of obtaining the new trial should abide the event.

So, if the plaintiff succeeds either on the whole case or on the excess, he will get his costs of both trials so far as the verdict on the second trial may shew him entitled.

If he succeeds as to all he claims, then, of course, all the costs. If only as to the trespasses which may be in excess of what the defendants can shew, they were not guilty of as to lots ten and eleven, and which they can justify as to the alleged allowance for road, then the costs, of course, will be limited.

Some of the observations of Chief Justice Draper, in *Manary v. Dash et al.* 23 U. C. R. at p. 582, seem to sustain the view taken by the Court of Common Pleas, though, perhaps, the whole case may not be to that effect. There the plaintiff declared for a trespass to lot eleven, in the fifth concession of Saltfleet. The defendant pleaded, (1) not guilty; (2) land not plaintiff's; (3) that the alleged trespasses were committed on lot twelve, in the fifth concession of Saltfleet, and on the land of the defendant.

The learned Chief Justice, as to the last plea said, "This allegation of title to number twelve, was wholly superfluous, unless the plea amounts to *liberum tenementum*, for it answered nothing alleged or proved or attempted to be proved by the plaintiff, and in asserting that the alleged trespass was committed on number twelve, the defendants in effect only deny they were guilty of the trespass charged on them."

He continues, "As at present advised, it appears to me that if the object of the defendants was to put in issue the fact whether the place in which the trespass complained of was actually committed was part of number eleven, and the property of the plaintiff, it should have been done in another form."

If the learned Judge is here confining himself to the effect of the third plea, then his observations would seem to shew he thought, under not guilty, the defendant might shew the trespass was not committed on lot eleven, and that would be a sufficient answer. But if he refers to the whole of the pleadings, then it may be he thought some other plea than not guilty, and land not the land of the plaintiff, was necessary.

On the whole we think it better to grant a new trial on the terms mentioned.

If the plaintiff wishes to compel the defendants to plead a justification, and that such a course would be right under the facts of the case, he might yet have to add another count to his declaration, describing his *actual close* by metes and bounds, and not embarrassing himself by fixing the particular spot as a part of either of the two lots mentioned.

If he is, and has been for twenty years in actual possession of the whole piece of land on a small part of which the trespass was committed, the proof of such possession would be *prima facie* evidence of ownership.

The defendants might then feel it necessary to justify a trespass in a part of a particular close by shewing it was not the plaintiff's land, and that they had a right to enter on it, and do the acts which they justify.

*Rule absolute for a new trial.*

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THE TRUSTEES OF THE TORONTO BERKELEY STREET CONGREGATION OF THE WESLEYAN METHODIST CHURCH IN CANADA IN CONNECTION WITH THE ENGLISH CONFERENCE V. HOLMES C. STEVENS.

*Action by trustees of church for subscription—Corporate existence—Pleading—Consideration—Evidence.*

The plaintiffs sued as "The Trustees of the Toronto Berkeley Street Congregation of the Wesleyan Methodist Church in Canada in connection with the English Conference," alleging that in consideration that they would take down or remove the church held by them for the purposes connected with the trusts set out in the deed conveying the land to them on which it stood, and would rebuild it so as better to answer the purposes of said deed, defendant promised to pay them \$160 to assist them in so doing:

*Held*, 1. That under *non assumpsit* only the defendant could not deny that the plaintiffs were a corporation, or had a right to sue or contract in a *quasi* corporate capacity, but that he should have put that fact in issue by a plea; and that the plaintiffs therefore were not bound to produce their deed. 2. That the plaintiffs being entitled to sue in such capacity their individuality was merged therein, and the objection that the defendant being a trustee was also one of the plaintiffs could not arise. 3. That the promise being voluntary was no objection, for the plaintiffs on the faith of it and of other promised subscriptions had rebuilt the church and incurred obligations, which would form a sufficient consideration. 4. That the evidence, set out in the case, warranted the jury in finding that the defendant's promise was made to the plaintiffs.

APPEAL from the County Court of the County of York.

This was an action by the trustees of the Toronto Berkeley Street congregation of the Wesleyan Methodist Church in Canada, in connection with the English Conference, against Holmes C. Stevens, to recover a subscription towards building a church.

The declaration set out that, in consideration that the plaintiffs would take down or remove the church or place of religious worship, standing on the premises, situate, &c., held by the plaintiffs for the purposes connected with the trusts set out in the deed conveying said land to them as such trustees, and would rebuild the said church or place of religious worship, so as to render the said premises better adapted to and for the accomplishment of the trusts, intents, and purposes of said deed, the defendant promised to pay the plaintiffs \$160 in a reasonable time from the 5th day of March, 1871, for the assisting them in so taking



down and rebuilding said church or place of religious worship ; and all things were fulfilled, and all things happened, and all times elapsed, &c., yet the defendant did not pay the same.

Pleas—1. *Non-assumpsit*. 2. *Nunquam indebitatus*.

3. That the plaintiffs did not take down and remove the church held by the plaintiffs for the purposes, &c., and rebuild the said church so as to render the said premises better adapted to and for the accomplishment of the trusts, intents, and purposes of said deed.

4. That the alleged agreement was made subject to certain terms in the deed as to notice of meetings to consider the alterations to be made, &c., which were not complied with, and defendant accordingly declined to perform the agreement.

5. That the agreement was made subject to certain terms, in the deed comprised, to appoint a judicious committee to estimate the amount required, &c., but the plaintiffs neglected to do so, &c.

Issue.

The cause was tried before John Boyd, Esq., the junior Judge of the County of York.

The material part of the evidence was as follows :—

James Bell stated that he was one of the trustees and secretary to the board of trustees. A meeting was called in the early part of March, 1871, for the purpose of erecting a new church. A meeting was held on the 27th February, 1871. Defendant was present as a trustee. It was resolved to call a public meeting for the purpose of erecting a new church. The defendant was present at a public meeting on the 5th March ; subscriptions were taken. Parties stood up and announced the amounts they would give. The defendant offered two amounts, \$150 for himself and \$10 afterwards for his wife. A building committee was formed. Defendant was a member of the building committee. The building committee consulted an architect, and got plans and specifications. There was a meeting held on 12th March, 1871. Plans were adopted, and defendant was

present at their adoption. Tenders were advertised for, and received 24th April, 1871. Tenders for the different parts of the work were received and accepted. Witness received a letter from defendant dated 27th April, 1871. The trustees did not return defendant his subscription.

*Cross-examined.*—Ten trustees were present on the 27th February, 1871. The Rev. Mr. Ross was nominated as an additional trustee. Defendant was a trustee. Rev. Mr. Punshon presided; \$10,000 or \$11,000 was considered the amount the church would cost. There was no money in hand on the 12th March, 1871. Not much on 24th April. Defendant is a trustee still. Witness never heard defendant protest against the illegality of the meetings. Tenders were accepted for the different work to be done in erecting the church. There are twelve trustees now. Defendant's letter came before a trustee meeting on May 1st. The board refused to withdraw his, defendant's, name from the subscription list. There has been no resignation of defendant as trustee, or of withdrawal from the church.

*Edward Galley.*—Was a trustee and on the building committee for building this church. Was present on the 5th March at the meeting, and heard defendant say he would give \$150 for himself and \$10 for his wife. Defendant afterwards offered to go with witness to see the architect to push forward the plan. Defendant and witness told the architect to get out plans. The next day or two after the 12th March, they went to the architect. The plans were completed. The defendant brought the plans from the architect to witness's house, and an estimate was made up of what the work would cost, and reported to trustees.

*Cross-examined.*—He did not recollect the defendant speaking to him about arbitration at all. The building cost \$12,000. Estimates were \$11,500. He never heard Stevens object to illegality of meetings. He heard him say if that was the way business was to be conducted, he would have nothing to do with it.

*Harrison, Q. C.,* for defendant, objected: 1. The plaintiffs were not a corporation; 2. The defendant

was one of the plaintiffs as trustee; 3. The promise was not with the plaintiffs, but with the chairman of the meeting; 4. That it was a voluntary promise; 5. The promise is not to pay in March, 1872, one year from date of promise; 6. If they were a corporation, they had no right to sue on contracts of this character. There was no proof that trustees had any deed or trusts.

Leave was reserved to move to enter a nonsuit.

For the defence.

*H. C. Stevens*—the defendant—stated that he was not a member of the Wesleyan body. He ceased as member on the 13th March, 1871, because they were acting illegally. The rule was not complied with. He objected to the meeting of 13th March. He never saw plan or specification after they were matured. There were alterations proposed. He objected to the chairman voting. He sent in his resignation to the minister on 23rd March. He ceased to be a member from that time. He gave up his ticket of membership, and had not been to church since. He called out \$150, and his wife called out \$10 herself. He had given \$100 to Carleton street church of the same persuasion. When Mr. Punshon was in the chair, they were trying to see what could be raised. He never made any objection at the time he went to the architect with Galley. He never got a written notice of meeting at any time. Notice was given out by the minister from the desk. There were nine trustees present when Galley came out. He wanted a gallery in front of the pulpit. There was a judicious committee appointed.

*Cross-examined.*—He told the secretary, Bell, about his objections: 1st. That there had been no written notice of meeting of 12th March. James Gooderham and Aikins were not present at any meeting. The principal business at the meeting, 12th March, was about the organ. There was no dispute about building, but about placing of organ. He attended no more meetings. He never objected about the non-appointment of the judicious committee. He left on account: 1st. Of the double vote of the minister; 2nd.

the meeting about the organ not being duly notified. He made no protest about the money, three-fourths of which should have been subscribed in cash. He told Mr. Coatsworth that they needed a new church, and that the old was a disgrace.

The letters referred to were as follows:—

“TORONTO, April 27, 1871.

“*To the Secretary of the Berkeley Street W. M. Church:*

“SIR,—Having withdrawn from the above church for reasons I need not relate, I wish to withdraw my name from the subscription list.

“Yours, &c.,

“HOLMES C. STEVENS.”

“TORONTO, March 23, 1871.

“*To the Rev. W. W. Ross:*

“SIR,—I hereby resign my membership as member of the Berkeley Street Church, of Wesleyan Methodist Church of Canada.

“HOLMES C STEVENS.

“P.S.—Enclosed you will find my ticket and my weekly contribution up to date. The trustees can let the seats in church.

“H. C. S.”

*Patterson, Q. C.*, objected that there was no evidence to support the 4th and 5th pleas.

*Harrison, Q. C.*, renewed his objections, and leave was reserved to enter a nonsuit.

A verdict was rendered for the plaintiffs for \$150.

In July term, 1873, *K. Mackenzie, Q. C.*, obtained a rule *nisi* to enter a nonsuit, or for a new trial, on the grounds of objection taken on the trial; and on the 25th July, after argument before his Honor Judge Duggan, the rule was discharged.

From this judgment the defendant appealed on the grounds:—

1. That the said County Court should have decided that



the plaintiffs are not a corporation, and that there was no proof given at the trial of their being a corporation, and the judgment of the said Court was erroneous in finding on the pleadings that the plaintiffs were not required to prove that they were a corporation.

2. The said Court should have decided that the plaintiffs could not sue the defendant, he being one of the plaintiffs, and that the plaintiffs had no remedy against the defendant at law, and the judgment was erroneous in not granting a nonsuit on this ground, and on the ground that the promise, if any, proved was a voluntary promise.

3. That the judgment was erroneous, in finding that there was evidence to go to the jury of a promise.

4. That the judgment was erroneous, in finding that the plaintiffs, even if they were a corporation, had any right or were competent to enter into or bring an action at law on such a contract as the one declared on in the said cause.

5. That the judgment was erroneous, because there was no proof at the trial of the deed mentioned in the declaration or of any deed, and there was no proof at the trial that the plaintiffs were a corporation or had any trusts, or that the work alleged to have been done in the declaration was done in accordance with the deed in the declaration mentioned, or with any deed.

6. That the judgment was erroneous in not setting aside the verdict had in said cause, and entering a nonsuit on the grounds stated at the trial, and on the grounds above enumerated.

7. That on the facts proved, the said rule *nisi* should have been made absolute and a nonsuit entered, or a new trial ordered.

November 24 and 25, 1873. *Mackenzie*, Q.C., and *Harrison*, Q. C., for the appeal. The Court below were wrong in finding the plaintiffs to be a corporation. The evidence does not support such a conclusion: Consol. Stat. U. C. ch. 169; *Doe dem. Methodist Trustees v. Carwin*, Rob. & Har. Dig. 380; *Doe dem. Presbyterian Trustees in Galt v.*

*Bain*, 3 U. C. R. 198; *Humphreys v. Hunter*, 20 C. P. 456; *Henriques v. Dutch West India Co.*, 2 Ld. Raym. 1532; *Norris v. Staps*, Hob. 210; *Bank of Auburn v. Weed*, 19 Johns. 300; *Williams v. Bank of Michigan*, 7 Wend. 541; *Jackson v. Plumbe*, 8 Johns. 378; *Bank of Utica v. Smalley*, 2 Cow. 770; *Woolf v. City Steamboat Co.*, 7 C. B. 103; *Liverpool Borough Bank v. Mellor*, 3 H. & N. 551. Some of these cases may be cited against defendant, but on examination they will be found in his favor. The defendant in fact is one of the plaintiffs, and cannot be sued by them. No promise, or at best only a voluntary promise, has been proved, and the general issue puts the consideration in issue. There was no proof of the deed mentioned in the declaration. The statutes require a deed of a particular form. The following authorities were also relied on: *Ireland v. Guess*, 3 U. C. R. 220; *Ireland v. Noble*, *Ib.* 235; *Furnivall v. Coombes*, 5 M. & G. 737; *Williams v. Lords Commissioners of the Admiralty*, 11 C. B. 424; *Fisher's Dig.*, Vol. I., 1915 "Corporation"; *Attorney-General v. Corporation of Chester*, 1 Hall & T. 46; *Conservators of the River Tone v. Ash*, 10 B. & C. 349; *Maynard v. Gamble*, 13 C. P. 56; *Re Baptist Church Property of Stratford*, 2 Ch. Cham. 388; *Angell & Ames*, on Corporations, 10th ed., 18; *Guthrie v. Fisk*, 3 B. & C. 178; *Chapman v. Milvain*, 1 L. M. & P. 209; *Russel v. Men of Devon*, 2 T. R. 667; *Pritchit v. Waldron*, 5 T. R. 14; 8 Vict. ch. 15; 32 Vict. ch. 50, O.; 36 Vict. ch. 144, O.; 33 Vict. ch. 29, O.

*C. S. Patterson*, Q.C., with him *Rose*, contra. The objection that there was no plea putting the deed in issue was taken at the trial. The plaintiffs went to trial, relying on its not being in issue, knowing that it was in England. The plaintiffs sue in their aggregate name, and that imports a corporation. If their corporate existence is denied there should be a plea to bring it in issue. As to the name importing a corporation, see *Norris v. Staps*, Hob. 210, 211; *Grant* on Corporations, 201. As to the question of pleading, misnomer must be pleaded in abate-

ment for corporations as well as in the case of individuals ; *Jowett v. Charnock*, 6 M. & Sel., 45 ; *Mayor, &c., of Stafford v. Bolton*, 1 B. & P. 40 ; *Foxwist v. Tremaine*, 2 Wms. Saund., ed. 1871, 621. *Nul tiel corporation* is the only proper plea : *Woolf v. City Steamboat Co.* 7 C. B. 103 ; *Liverpool Borough Bank v. Mellor*, 3 H. & N. 551 ; *Agricultural Cattle Ins. Co. v. Fitzgerald*, 16 Q. B. 432. The cases of *Henriques v. Dutch West India Co.*, 2 Ld. Raym. 1532 ; *National Bank of St. Charles v. De Bernales*, 1 C. & P. 569 ; *Dutch West India Co. v. Van Moses*, 1 Str. 612, may appear to require proof of the corporation, but these were all foreign bodies. It is doubtful as to these if the rule would be enforced now ; See *La Banca Nazionale sede di Torino v. Hamburgher*, 2 H. & C. 330. The effect of the statute is to shew that the Legislature intended the plaintiffs to be a corporation. They also cited 9 Geo. IV., ch. 2, Revised Statutes, p. 476 ; 3 Vic., ch. 73 ; 18 Vic., ch. 119 ; 12 Vic., ch. 92 ; Consol. Stat. U. C., ch. 69, sec. 3 ; 7 Vic. ch 68 ; 13 & 14 Vic., ch. 78 ; *Doe d. Trustees of Presbyterian Church at Galt v. Bain*, 3 U. C. R. 198 ; *Church v. Imperial Gas Light & Coke Co.*, 6 A. & E. 846 ; *Welland R. W. Co. v. Blake*, 6 H. & N. 410 ; *Abbott's Nat. Dig. Corporations Cases*, 73, 74, 75, 88, 89 ; *Smith v. Goldsworthy*, 4 Q. B. 430 ; *Corporation of Phisitians v. Tenant*, 2 Bulstrode, 185.

June 19th, 1875, RICHARDS, C. J., delivered the judgment of the Court.

Rule 5 of the General Rules as to pleading, at page 712 of *Harrison's C. L. P. Act*, 2nd ed., provides that, " In all actions by and against the assignee of an insolvent debtor, or against executors or administrators, or persons authorized by Act of Parliament to sue or be sued as nominal parties, the character in which the plaintiff or defendant is stated on the record to sue or be sued shall not in any case be considered as in issue unless specially denied."

It is contended this rule only extends to actions by and against assignees, and by and against executors and persons

authorized to sue and be sued as *nominal* parties ; and that these plaintiffs, if a corporation or quasi corporation, are not *persons* suing as nominal parties.

The decisions, however, seem to shew that the course to pursue by a defendant who wishes to deny either that the plaintiff or the defendant, when suing as a corporation, is a corporation, is to put the fact in issue by a plea.

In *The Agricultural Cattle Insurance Company v. Fitzgerald*, 16 Q. B. 432, 438, it was held that *nunquam indebitatus* did not put in issue the regular formation of the company. The Court held the defendant might have put in issue the certificate of the complete registration as well as the fact of the complete registration, but had omitted to do so.

In the *Liverpool Borough Bank v. Mellor*, 3 H. & N. 551, where the defendants wished to shew that the plaintiffs were not properly incorporated, the Court allowed a plea of *nul tiel corporation* to raise the point.

In *Woolf v. City Steamboat Co.*, 7 C. B. 103, the defendants contended they were not a corporate body. Maule, J., said *arguendo*, "If the defendants are in fact a corporation, the declaration is correct : if they are not, they may traverse it.

In *La Banca Nazionale sede di Torino v. Hamburger*, 2 H. & C. 330, the defendants pleaded that the plaintiffs at the time of the commencement of the suit were not a body corporate, nor entitled to sue in this country by the said name and style.

These references seem to shew that it has been considered necessary to raise the question as to the plaintiffs' right to sue in a corporate capacity or by the name of trustees, by plea.

The sixth rule, following the one referred to from *Harrison's* C. L. P. Act, 2nd ed., 712, declares, that the effect of "non-assumpsit \* \* shall operate only as a denial in fact of the express contract, promise, or agreement *alleged*, or of the matters of fact from which the contract, promise or agreement may be implied by law." Here the



plaintiffs contend there is an express promise proven, and that is all that is denied by the pleas.

In the case of *Humphreys et al. v. Hunter*, 20 C. P. 456, Mr. Justice Gwynne, in an able and well considered judgment, referring to the Consolidated Statutes of U. C. ch. 69, expressed the opinion that the trustees might maintain ejectment in their *quasi* corporate name, as trustees for land which they held for a religious body, and from this it follows they may also by the same name sue for or distrain for rent in arrear on lands leased by them or their predecessors in pursuance of the Act.

The case referred to does not expressly decide that the trustees are a corporation, though they possess most of the requisites of a corporation. If they were a corporation, they could, no doubt, enter into any agreement or contract not *ultra vires*, and as a *quasi* corporation they can do those things which the Legislature authorized them to do.

In *The Trustees of the Ainleyville Congregation, &c., v. Grever*, 23 C. P. 533, the Court followed the decision in *Henderson v. White*, 23 C. P. 78 and the learned Chief Justice of that Court refers to the Consolidated Statutes U. C. ch. 69, and to 36 Vic. ch. 135, O., (which last statute was passed since this action was commenced), which provides for congregations determining the course of appointment of trustees when such course has not been prescribed in the deed of grant of the land. He then adds,

“I think we may hold in this case, that the plaintiffs herein hold this land under the deed from Holliday, as a corporation, or at least in a corporate or collective name, as described in that deed; and that the statutes recognize their right to act by and use such name.”

The first statute passed on the subject, 9 Geo. IV., ch. 2, recites the difficulty in securing the title to land for the site of a church by various bodies of Christians “for want of a *corporate* capacity to take and hold the same in perpetual succession,” and then provides for the naming of trustees. The statute 3 Vic. ch. 73, has a similar recital.

Section 3 of Consol. Stat. of U. C. ch. 69, authorizes the

trustees to borrow money to pay a *debt* contracted for the building, repairing, extending, or improving of a church, meeting-house, or chapel, on land held by trustees for the benefit of any religious society; and to mortgage this land, church, or meeting-house to secure the debt or to repay the money borrowed to pay the debt.

Then there is the power to lease and renew leases and sue for or distrain for rent.

These extensive powers under the statute may be exercised by the corporations or *quasi* corporations created under deeds, and the plaintiffs assuming to act in that capacity, and having sued on an agreement alleged to be made with them, and defendant having only by his plea in effect denied the making of the agreement, and not the capacity of the plaintiffs to have such an agreement made with them in their *quasi* corporate capacity, I fail to see how the plaintiffs were bound to produce their deed to prove their right to sue or to contract when that is not properly called in question.

We think, therefore, the defendant fails on the first question taken as a ground of appeal.

As to the second objection, if the plaintiffs can sue in their *quasi* corporate capacity as trustees, without naming any as such, under these pleadings I fail to see how the objection set up can arise, the individuality of the defendant being merged in their corporate capacity.

As to the promise being voluntary, we fail to see how that can make any difference if the plaintiffs, on the faith of defendant's and other promised subscriptions, went on and tore down their church, rebuilt it, and in that way did what the defendant wished and desired them to do in consideration of his promise. The consideration having been executed, or the plaintiffs having incurred a liability on the faith of the promise before it was withdrawn, that would seem to be a sufficient consideration for it when the building was completed according to the proposed scheme. The second ground fails.

The third is, that there was no evidence to go to the

jury to shew that the promise was made by the defendant to the plaintiffs.

The evidence as taken down by the learned Judge does not go very much into details. As far as we can understand the matter, the defendant was one of the trustees of the plaintiffs' church, and he amongst others thought the old building of the church ought to be pulled down, and a new one erected on the land in its stead. The defendant himself told a gentleman that they needed a new church, and that the old one was a disgrace to them.

A meeting of the trustees, of whom the defendant was one, was held on the 27th of February, 1871, for the purpose of erecting a new church. It was resolved to call a public meeting (of the congregation, I suppose,) for the purpose of erecting a new church. The meeting was held on the 5th March, when the defendant was present, and subscriptions were taken. Parties stood up and announced the amounts they would give. Defendant offered two amounts—\$150 for himself and \$10 for his wife.

A building committee was formed, of which the defendant was a member. The committee consulted an architect, and got plans and specifications. The committee had a meeting on the 12th of March, when the plans were adopted, and the defendant was present at their adoption. Tenders were advertised for; they were received on the 24th April, and accepted for the different parts of the work.

The defendant went with a gentleman called as a witness to see the architect, to push forward the plans; and they both told the architect to get out the plans. A day or two after the 12th March, when they went to the architect the plan was completed. The defendant took the plans, brought them to the witness's house, and they made an estimate of what it would cost, and reported it to the trustees. The estimates were \$11,500, and the cost was \$12,000. Apparently the defendant was dissatisfied with the decision about the placing of the organ, and did not attend any other meeting of the trustees. He made some

objection to the chairman's voting. He said he ceased to be a member on 13th March, on account that they were acting illegally. He stated he sent in his resignation to the minister on the 23rd March.

On 27th April defendant sent a letter to the trustees, who did not relieve him from his subscription. The letter was to the secretary of the trustees, and is below. The secretary of the trustees said there had been no resignation of defendant as trustee, or of withdrawal from the church. As to the withdrawal, a letter was put in as follows:—

“TORONTO, March 23, 1871.

“*To the Rev. W. W. Ross :*

“SIR,—I hereby resign my membership as member of the Berkeley Street Church, of the Wesleyan Methodist Church of Canada.

“HOLMES C. STEVENS.

“P.S.—Enclosed you will find my ticket and my weekly contribution up to date. The trustees can let the seat in church.

“H. C. S.”

The letter of the 27th of April was as follows :

TORONTO, April 27, 1871.

“*To the Secretary of the Trustees of the Berkeley Street W. M. Church :*

“SIR,—Having withdrawn from the above church for reasons I need not relate, I wish to withdraw my name from the subscription list.

“Yours, &c.,

“HOLMES C. STEVENS.”

There was no evidence given as to the peculiar provisions of the deed as to how the affairs of the trustees were to be managed, or how the debt for the building of the new church was to be contracted or paid.

The trustees held the primary meeting at which it was proposed the new church should be built. The defendant was one of the trustees, and was apparently active in the object they had in view. After the public meeting was



held, and after he had subscribed the \$150 for himself and \$10 for his wife, he became a member of the building committee. It does not clearly appear whether this building committee was appointed by the trustees from their own body, but as far as any of them are named they appear to have been trustees. Mr. Galley, another of the building committee and a trustee, says that he and defendant made up an estimate of what the work would cost, and reported to the trustees. And the defendant also attended a meeting of the trustees on the 12th March, where the plans were before them, and where the difficulty arose which induced the defendant to withdraw from the body.

The inference from the evidence, we think, is, that the trustees are the body who built the new church, and whom it was understood throughout were to be the parties to do it. The property which they held in trust, could be mortgaged to pay the costs of the building; or the trustees could have borrowed the money for that purpose and mortgaged the building for its repayment.

In this view, any subscriptions or promises to pay money for the purpose of rebuilding the church, were properly considered as made to them.

The deed under which the plaintiffs held the land was not produced, nor did it appear when it was made, but if made subsequent to 24th May, 1850, when the body to which the present church belongs obtained the form of a model deed, as it is described in the Statutes of Ontario, 35 Vic. ch. 107, it is probable it contained express provisions that the trustees and their successors or trustees for the time being, should build on some part of the land; or when necessary should repair, alter, enlarge, and rebuild a church or place of religious worship. The form appended to the statute does not assume to be in the words of the "model deed," but it is probable the provisions are similar.

The learned Judge has not made any note of his charge to the jury on the trial, nor is any express objection taken as far as I can see, that there was no evidence that it was

not understood that the trustees were to be the parties to erect the new building, and that the subscriptions were to be paid over to them. The objection noted is, that the promise is not with the plaintiffs, but the chairman of the meeting.

We understand from what the learned Judge says in his judgment, that he left the matter in this way to the jury. He says on this point,

“ I think there is evidence to go to the jury to shew that the plaintiffs called the meeting at which the defendant subscribed; and that he, with others attending it, was aware of this fact and of the object of the trustees in holding the meeting; and that the persons thus contributing or agreeing to contribute to that object were then dealing with the trustees, and not with the meeting; and that the defendant acted in this view may further be inferred from his letter of the 27th April. \* \* \* And I consider the jury on all the evidence were warranted in finding that the alleged promise was made with the plaintiffs.”

If then it be assumed that the plaintiffs were the parties who were to rebuild the church, and they had undoubted authority to mortgage it to pay for rebuilding, it seems to me quite consistent with their position as trustees under the statute that they should take, receive, and hold money or property given for the purpose of paying the cost of rebuilding the church; and inasmuch as the congregation are the persons who are supposed ultimately to pay debts incurred for these purposes. We see no reason why any member of the congregation may not voluntarily pay or promise to pay any sum of money to these trustees for that purpose, so that the whole congregation may be saved from the additional expense of raising money on bond or mortgage.

If the trustees may receive and hold money or property to be applied to the building of a new church, they may take a note endorsed to them for that purpose, and sue it when due if not paid. If so, why may they not take a promise from any person to pay them a sum of money for

that purpose, and in default of payment, when they have expended the money in doing what the party subscribing wished them to do, and which they themselves proposed to do, sue for and recover the money promised to be paid? I see no valid reason why this should not be done.

I am not prepared to say that a mere promise by a member of a congregation to give a sum of money to trustees, to enable them to rebuild or enlarge a church, is by law so binding that the party may not withdraw from it. But if the trustees, on the faith of the promise, and before it is withdrawn, enter into obligations on the faith of it, incur the expense of plans and accept proposals to do the work that they were induced to undertake by promised subscriptions, then it seems to me that the person making the promise cannot withdraw from it; and when the work is completed, as in this case, if he do not pay he may be sued for the money so promised.

The fifth, sixth, and seventh grounds of appeal are virtually disposed of by what has already been said.

If the defendant considered that the terms of the deed conveying the land to the plaintiffs would have aided him in his defence, he should have taken steps to have had it produced at the trial, and as the plaintiffs were not bound to produce it, and he took no steps for that purpose, he cannot now set up any defence which requires the aid of that deed to sustain.

If he had considered the deed essential to his defence, and had shewn he was taken by surprise at its non-production, the learned Judge of the County Court might have granted a new trial on that ground if the Court had been so moved. That not having been done, it cannot be considered a matter of defence now.

*Appeal dismissed (a).*

## BENDER V. THE CANADA SOUTHERN R. W. CO.

*R. W. Co.—Accident at farm crossing—Liability.*

The relative rights and duties of railway companies and landowners with regard to the use of farm crossings considered.

The defendants in this case were sued for injury done to the plaintiff's cattle, which were killed by a train while they were crossing the railway at a farm crossing, where the line ran through the plaintiff's farm upon a level. Upon the evidence, set out below, the jury twice found for the plaintiff, acquitting the plaintiff of all blame, and finding the defendants guilty of negligence, in not keeping a sufficient look out on rounding the curve before coming to the crossing, and the Court refused to interfere.

THE declaration alleged the plaintiff to be the owner of lot No. 128, in the township of Stamford, through which the railway of the Erie and Niagara Railway Company passed, and over which railway a crossing had been made to enable the plaintiff and his servants and cattle to pass and re-pass, of which railway the defendants were at the committing of the grievances the lessees and occupants, and had the management and running power thereon, and it was the defendants' duty in using the railway so to propel their engines and manage the same on the railway, towards, up to, and upon and across the said crossing, and with reasonable and proper care and caution, and to use otherwise reasonable and proper care and diligence to avoid and prevent accident and injury by them to persons and cattle lawfully being in and upon and passing and crossing over the railway at the said crossing. Yet the defendants, regardless of their duty, drove one of their engines along the railway towards, up to, upon and across the crossing, at such a rate of speed and with such gross negligence, that the same struck against and killed and injured certain cattle of the plaintiff, to wit, four cows of the value of \$500, then lawfully being in and upon the railway crossing over the same in charge of the plaintiff.

Pleas 1; not guilty. 2. That the alleged grievances were caused by the negligence and improper conduct of the plaintiff, and not otherwise. Issue.



The cause was tried at St. Catharines, at the Fall Assizes, 1873, before Morrison, J.

The evidence, material to be considered, was as follows :—

The plaintiff said the railway crossed his farm almost on a level. In September, 1872, after he had milked his cows, he was driving them to the pasture across the railway track between six and seven p.m. As soon as the cattle got on the track an engine came up. He had no notice of it until four of the cows were hit and killed. He was within a foot and a half of the track at the time. The engine was running at a high speed. One of the cows was carried 50 yards by the engine. The engine came from the direction of the town of Clifton. There was a curve in the road between Clifton and his crossing and a bush of trees.

In cross-examination he said he milked the cows near the barn, between it and the crossing. The barn is 200 feet from the railway fence. He was aware an engine and tender were taking men down all the week from Clifton to Chippewa, and running back again. It passed each evening about the time he got the cows for milking. On this occasion he was looking towards Chippewa when he was opening the gate to allow the cattle to pass through, as he did not think the train had then passed to Clifton. He could see half a mile towards Chippewa. He did not look towards Clifton as he did not expect the engine from that quarter. It is an open crossing, and he kept a gate to prevent his cattle getting on the track at all. The gate was 150 feet from the barn where he had to drive them from. There were eleven cattle in all. When they got to the gate at the railway they would crowd together. The foremost cattle were not off the rail track when the four were struck. Seven got across. He heard the rattle of the engine, but he had not time to get the cattle off the track. If the engine had been going at ten miles an hour he could have got the cattle over the track. He did not know the engine was down on him until he was within a foot and a half of the track, when it passed him. The bush

is on the opposite side from his barn and on the west side of the railroad, and on the east side of the barn the wood is only a few rods from the barn. He could see 400 yards towards Clifton. He expected an engine would appear as he was driving the cattle across the track, but he expected it to come from Chippewa and not from Clifton.

*Re-examined*: If the engine whistled he could have heard it. When he opened the gate the engine could not have been between the bush and the crossing.

*Z. B. Lewis* said, among other things, one can see 300 or 400 yards from the crossing towards Clifton; the other way, half a mile, at the plaintiff's barn.

For the defence, it was said by *Alexander Gosling*, that he was the engine-driver on the occasion. He was going from Clifton to Chippewa with some workmen. This was on Saturday evening. He took the men about 7 p.m. Sometimes he went up about 6 p.m. He first sounded his whistle at a curve near plaintiff's—a good long blast entering the curve; that was all the whistle he gave. As he rounded the curve, he saw the cattle about crossing the track. He was going about eighteen or twenty miles an hour. He was 300 yards from the cattle when he first saw them. They were then making for the track. He reversed the engine at once after he saw them, and he was then about 150 yards from the cattle, and the engine stopped about 100 yards after he struck them.

In cross-examination, he said he only gave one whistle; no whistle on leaving Clifton. He was looking out and saw the cattle about 300 yards off just crossing the track. He whistled on entering the curve. He could not say he rang the bell.

*Re-examined*: The whistle he gave was because he was going round a curve, as it is usual to do.

*Harry Johnston*, the fireman on the engine at the time, said he rang the bell about 800 yards from plaintiff's crossing to warn a woman who was walking on the track. Gosling whistled quite a while round the curve and through the bush. When the witness saw the cattle, he said to

Gosling they would be into them. The witness rang the bell, and Gosling whistled and reversed the engine at once. The crossing was clear as they came out of the curve.

It was said by *Thomas McMahon*, who was there on a hand-car on the line, and who took it off on hearing the whistle, just before the cattle were killed, and 100 yards nearer Clifton than the plaintiff's crossing, that the distance was only about half a mile from the Suspension Bridge railroad yard, from which the engine had started to the plaintiff's crossing.

At the close of the plaintiff's case the defendants' counsel moved for a nonsuit, because no duty was cast on the defendants to pull up or whistle on approaching a private crossing; that the plaintiff was bound to keep a look out and observe due caution, which was not done here in the way in which the cattle were driven over the track; and that there was no evidence of negligence.

It was stated that the damages were not disputed if the plaintiff was entitled to recover.

The learned Judge said his inclination was against the plaintiff, but he would not nonsuit. He would allow the case to go to the jury to get their opinion as to the necessity or propriety of the defendants sounding the whistle as a sufficient warning to the plaintiff before coming to his crossing.

And at the close of the case, the learned Judge said that, in his opinion, there was no evidence of negligence on the part of the defendants unless the not blowing the whistle before the engine approached the plaintiff's crossing was negligence or evidence of it, and he would leave that to the jury. If they found the whistle was not sounded in sufficient time, he should enter a verdict for the defendants, reserving leave to the plaintiff to move to enter the verdict for him with damages agreed to at the amount of \$450, in case the Court should be of opinion on the whole case the plaintiff was entitled to recover.

The jury found "That the defendants did not whistle sufficiently at the opening of the curve."

In Michaelmas term, November 17, 1873, *James A. Miller* obtained a rule *nisi* calling on the defendants to shew cause why the verdict entered should not be set aside, and a verdict entered for the plaintiff, pursuant to leave reserved, with damages to the amount of \$450.

November 27, 1873, *Crooks, Q.C.*, shewed cause. There is no evidence of any negligence whatever by the defendants. They were not obliged to give warning before they came to private crossings. The statute does not impose upon them that duty. They were not going at an undue speed. They sounded the whistle as they entered on the curve, which was a warning to all persons, and they did all in their power to prevent the accident so soon as they saw the cattle going to the track. They could not have done more than they did do. The blame was, at the least, chiefly attributable to the plaintiff. He kept no look out at all, although he could see in the direction from which the engine was coming a distance of 400 yards. He was, therefore, if the company were in fault to some extent, a contributory to his own injury, and was not entitled to be compensated by the defendants.

He cited *Stubley v. The London & North Western R. W. Co.*, L.R., 1 Ex., 13; *Nicholls v. The Great Western R. W. Co.*, 27 U. C. R. 382, 396; *Kline v. The Great Western R. W. Co.*, C. P.

*Miller* supported the rule. The train that day from Clifton was an hour late. The plaintiff supposed it had passed, and that the engine he had to watch for was the same one on its return from Chippewa, which was the reason why he gave his attention to an engine which he expected to come from the direction of Chippewa; and as he could see half a mile along the railway in that direction from his barn, and saw no engine coming, he thought he was safe in driving his cattle to the pasture across the track. It was found by the jury that the defendants gave no sufficient warning of their approach, which was a neglect of duty on their part: *Saunders on Negligence*, 45. *The Directors of the Hammersmith & City R. W. Co.*



v. *Brand*, L. R. 4 H. L. 171. The plaintiff had a right to be on his farm crossing : *Barrett v. The Midland R. W. Co.*, 1 F. & F. 361 ; *Leishmann v. London & Brighton & South Coast R. W. Co.*, 23 L. T. N. S. 712. All the matters which were alleged to be negligence or evidence of negligence against either party were triable by the jury, and they were the only tribunal to deal with them. *Gee v. The Metropolitan R. W. Co.*, 25 L. T. N. S. 822 ; *Shepherd v. The Midland R. W. Co.*, 25 L. T. N. S. 879. And the jury have found express negligence against the defendants, but none against the plaintiff. The plaintiff on the law and facts is entitled to have his rule made absolute.

December 22, 1873. WILSON, J., delivered the judgment of the Court.

The whole of the land within the railway fences on each side of the track, is vested in and owned by the railroad company, as the proprietors in fee. The farm crossing is an easement, or right of way, or passage, which the occupier of the farm, has, for the purposes of his farm, over the soil of the railway company contained within the limits of the crossing.

It is a communication between the two sections of his farm, in consequence of its severance by the line of railway through his land. If this be a farm crossing, and the plaintiff claims it only in its limited form, the occupant of the farm can have no right to be in and upon the crossing for any other purpose than the mere purpose of passing and repassing to and from one divided section of the farm to the other, and for so passing and repassing as occasion may require.

A general right of crossing it is said confers a right to use it for all purposes to which the land could be applied, subject only to the passage of the railway traffic: *United Land Co. v. Great Eastern R. W. Co.*, L. R. 17 Eq. 158.

It is just the same right which it was held one of the public had to the use of a highway, the soil of which was vested in the adjoining proprietor in fee: *Dovaston v. Payne*,

2 H. Bl. 527, S. C. 2 *Smith's* L. C. 7th ed. 136; *Regina v. Pratt*, 4 E. & B. 860—the right of passage, and that only—and not the right to be in and upon it generally.

The plaintiff was using his crossing lawfully and properly at the time of the accident, for the mere purpose of passage for his cattle from one part of his farm to the other.

The defendants were also at the same time lawfully and properly using their railway, and the crossing in question as a part of it.

The accident happened, and the enquiry is—was it from the fault of either party? If it were, then of which of them, or were they both in fault?

There is nothing in the statute on this subject. The Consol. Stat. C. ch. 66, sec. 104, which requires the bell or whistle to be sounded at the distance of at least eighty rods from a crossing, is in its terms confined to “where the railway crosses any highway.”

The rights of the parties must therefore be settled by the general principles of the law.

There are here two existent, and in a sense opposing rights. Each party is entitled to use this particular part of the railway—the one as a farm crossing, the other as a part of their line of travel. They cannot both use it at the same time, and neither of them is bound to afford preoccupation of it that is to give precedency in the use of it to the other. It seems plain, however, that the one who has preoccupation or user of it, is entitled to retain it until his or their legitimate occupation or user of it is ended.

In exercising the right to use it, each must bear in mind the right of the other to use it also, and the chance or probability there is of the other using it or claiming to use it at just the same time.

The duty of the defendants may be very well described as follows: “In crossing a footway on a level the company are bound, as to the mode of working their railway, as to the rate of speed, and signalling or whistling, or other ordinary precautions in the working of a railway, to do

everything which is reasonably necessary to secure the safety of persons who have to cross the railway by means of the footway," per Mellor, J., in *Cliff v. Midland R. W. Co.*, L. R. 5 Q. B. 261.

"And the greater the thoroughfare over any part of the line, the greater the care and vigilance that ought to be exercised by those who have the charge of the trains. Those persons ought to anticipate that people may be crossing where they know people have a right to cross. Whatever the degree of traffic may be, be it more or less, a corresponding degree of care is required on the part of the company," per Lush, J., *ib.* at p. 266.

So, also, "If the railway company in the construction of the works \* \* do anything which prevents persons passing over the line from taking care of themselves, and exposes them to greater peril than is ordinarily incident to a level crossing, the company thereby impose upon themselves an obligation to take other than the usual precautions for the protection of persons who have a right to pass there," per Lush, J., *ib.* at p. 264.

It was thought in that case that the decision in *Bilbee v. The London, Brighton, and South Coast R. W. Co.*, 18 C. B. N. S. 584, could be supported, because as Mr. Justice Lush said, in the first-mentioned case, L. R. 5 Q. B., at p. 265: "The railway company had so constructed their line as to make a sharp curve at the spot where this train passed; they also built a bridge which prevented a passenger from seeing a coming train until it was very near; and on that account the company, having themselves created a peculiar difficulty, and exposed passengers to more peril than the Legislature contemplated, and more than was ordinarily incident to a level crossing, undertook the obligation of providing some additional protection."

That language seems to be applicable to the present case. The rate of speed and the necessity there might be of giving warning of the approach of a locomotive, must depend on the nature of the crossing, the frequency or infrequency

of its use—the purpose for which it is used, whether only for human beings, or for them and for cattle also, or chiefly for cattle,—for in the case of cattle, unconscious of the danger, there would be more difficulty in hurrying them over, especially when many of them were huddled together, than if human beings were passing,—the formation of the ground, and whether from that or from any other cause, natural or artificial, the place of crossing could be seen at such a distance from the engine that its speed could be checked, or be altogether stopped, in case of danger being imminent.

There is, however, a reciprocal obligation on the plaintiff, for, “where the Legislature authorizes a railway to cross a way, public or private, upon a level, and does not require from the company any precaution to avoid danger, the Legislature intends that the persons who have to cross that line should take the risk incident to that state of things,” per Lush, J., in *Cliff v. Midland R. W. Co.*, L. R. 5 Q. B., at p. 264.

The plaintiff must guard against a railway engine with more vigilance and care than he would against a team of horses; so if an engine pass daily at or about a certain hour, he should perhaps avoid altogether using his crossing at that particular time, unless there is a strong necessity for his doing so, or at any rate he should be more than usually careful at such a time how he does use it, for he knows there is then danger near.

And he should also be more cautious in using the crossing, if there be obstacles of any kind, artificial or natural, in the way of his seeing or hearing the engine at a safe distance. The case, it appears to me, is reduced to the ordinary occurrence of cross roads meeting, and of persons driving on these roads with common conveyances, excepting that as the railway engine is more dangerous than a common vehicle, so it must be more carefully propelled and more anxiously looked out for; and excepting that a farm crossing is not likely to be so much in use as a public highway, or it may be considered as in the case of a foot



passenger crossing the thoroughfares for horses and vehicles from one side of the street to the other.

In *Cotterill v. Starkey*, 8 C. & P. 691, Mr. Justice Patte-son said, at page 694, "A foot passenger has a right to cross a highway \* \* and \* \* persons driving carriages along the road are liable if they do not take care so as to avoid driving against the foot passengers who are crossing the road." See also *Boss v. Litton*, 5 C. & P. 407.

So in *Barrett v. Midland R. W. Co.*, 1 F. & F. 361, where persons were in the habit of crossing a railroad at a particular place, though there was no right of way there, it was held to throw upon the company the responsibility of taking reasonable precaution in the use of their trains at such a place.

It cannot be said that the defendants are free from all concern and responsibility, whether the plaintiff or his cattle is or are using the farm crossing at the time that one of their engines is approaching. They must be bound to use some care and prudence, and we think the declaration sufficiently describes their duty in that respect.

Have the defendants, then, upon the evidence, properly performed their duty, and has the plaintiff performed his? The plaintiff drove from his barn, a distance of about 150 feet, to the railway fence, eleven cattle to take over the crossing. He thought the engine had passed from Clifton to Chippewa before that, as it should have done if it had been on time; and he knew he had to guard against the engine on its return from Chippewa to Clifton.

He was watching in the direction of Chippewa, and he kept no look out in the direction of Clifton, from which quarter the engine was really coming. He said he could see 400 yards along the line towards Clifton, and that he did not hear the engine, nor see it as he said, nor "knew the engine was down on me until I was within a foot and a half of the track when it passed me."

There appears to have been some carelessness on the part of the plaintiff in not knowing the engine was approaching him till he was within eighteen inches of the track, although he could see along the line nearly a quarter of a mile.

If he had been claiming for an injury done to himself, it would have been difficult to satisfy any disinterested tribunal that he was not accessory to his own hurt, for a notice of two or three seconds would have been time enough to have enabled him to have saved himself; and if he had not given even that time to his own safety while the locomotive was passing over a distance of 400 yards, and all the time in sight, he would scarcely be said to have acted with any kind of prudence.

But we are dealing with cattle, which cannot be driven as readily out of danger as a man can escape from it, and which do not act under the same impulse, nor apprehend danger which is not immediately present.

If the plaintiff, on the instant he opened his gate and set his eleven cattle on to the crossing, had been warned of the engine being 400 yards off, and coming at twenty miles an hour, it is difficult to say whether he could or could not have got them all over the track in the forty seconds it would take the engine, from that spot and at that speed, to reach the crossing,—probably he could.

But the locomotive was not running at twenty miles an hour the whole of the way up to the crossing. For the last 150 yards the engine was reversed and the speed was slackening; the locomotive, however, was not brought to a stand till it had killed four cattle and gone 100 yards beyond the crossing; perhaps the whole time may have been about forty seconds that was occupied by the locomotive in running from the point of sight, 400 yards off, to the crossing.

If the plaintiff could have reasonably got his cattle over within that time, then, although the whistle was not sounded until the engine was at the 400 yards distance, and he failed to get his cattle over because he was not on the watch for the engine, he would not be entitled to recover, because he would be at any rate contributing to his own injury.

If, on the other hand, the engine driver, seeing the cattle "making for the track," as he says he did, at the

distance of 300 yards, he should have sounded the whistle again upon so discovering them, and he should have continued sounding it, and he should then have reversed his engine, and should have done then, at that instant and distance, all in his power to stop the locomotive, and if he could have stopped it before it came to the crossing, and he did not, but reversed it only at the distance of 150 yards from the cattle, when it was too late to save them, the defendants must be to blame.

So they must also be to blame if, by sounding the whistle at 300 yards off without slowing the engine at all, the plaintiff could have got his cattle over in safety.

I am not quite satisfied the case has yet been as fully investigated as it should be to enable us to determine it upon this evidence.

It is clear the defendants were not bound to sound the bell or whistle as a duty, nor to do any other special or particular act by way of warning in approaching this farm crossing, because the statute does not require it. But they knew the plaintiff had the right of crossing at that place, and they were bound to know he might be using it or be about to use it as they were approaching it.

The defendants cannot be justified in running too near the crossing without any regard to whether the plaintiff was exercising or was about to exercise his right of passage or not. And if from any obstruction in the way, artificial or natural, the plaintiff could not see such a distance along the line as enabled him to observe and guard against the locomotive with safety when he was using or was about to use the crossing, the defendants would be bound to give him warning by bell or whistle, or in some way or other, of the approach of danger.

They could not be required to give warning at a greater distance than eighty rods, the statutable distance, as in the case of crossing highways.

They would be obliged also to adjust their speed to his particular locality, as it might be affected by or be near to or be upon a curve, embankment, bridge, thoroughfare, or

be otherwise so circumstanced as to make it more or less dangerous, and to necessitate more or less of caution.

But the defendants are as much entitled to be protected against the plaintiff crossing their line, as he is to be protected against their passing his crossing; and the common rule in such a case must apply between them as in the use of highways, with the distinction that as a steam locomotive is a more dangerous power than a horse, so the greater circumspection must be exercised in the use of it.

The rule is, that although the plaintiff be in fault, the defendants must not carelessly do him injury, if by the exercise of reasonable care they can avoid it. And their mode of avoiding it would be by sounding the bell or whistle, or by slowing or altogether stopping the engine if they can do so in time to prevent it; and it would be their duty to do so at such a distance when they could or should have seen the object in danger if their servants had been reasonably watchful.

The jury have found that the defendants did not whistle sufficiently at the opening of the curve. I do not know whether that means at the beginning of the curve or at the end of it. I presume the jury meant that the defendants did not whistle at a sufficient distance from the crossing, and that would be at the beginning of the curve; or they may have meant, as the point of vision of 400 yards from the crossing strikes upon the line in its curve, that the whistle was not sounded as the crossing opened to the engineer on his coming round the curve.

The jury may have considered it was the defendants' duty to have sounded the whistle, but they were not bound to do that specific act. They were bound to act reasonably and carefully with respect to the plaintiff's right to be upon his crossing on their line for his necessary lawful purposes, and the jury have not found whether the defendants did so or not.

The plaintiff, too, was obliged to exercise his rights with care as well for his own safety and that of his cattle as for the safety of those travelling on the railway, and to look



out and guard against danger as far as he reasonably could do it. And the jury have not found whether he did so or not, nor whether or to what extent he contributed to his own injury.

These private or farm crossings are more embarrassing to railway companies than crossings by other railways. In the latter case the time and mode of user of the crossing are all specially provided for between the companies, so that each of them knows beforehand whether the crossing will be in use or not at any particular time.

But with respect to these private crossings, the company can never know either by night or by day whether all the private crossings along their line may or may not be in use, just as their train approaches each one of them; and to demand from companies the same degree of care which the statute has not provided for, but which it has expressly required, shall be shewn to the public in crossing highways—or to excuse these occupiers from exercising at all times, in the use of their way, a high degree of caution, would be to prejudice very greatly not only the benefit, but the safety of railway travelling.

It is better, we think, the case should be more fully investigated.

The rule will be absolute to set aside the verdict, and for a new trial, the costs of the last trial to be costs in the cause for the successful party.

*Rule absolute.*

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After the foregoing judgment was given in this case a new trial took place, and the jury found again for the plaintiff. They also found, specially, that the plaintiff was not guilty of negligence in driving his cattle upon the track, and that the damage was caused by the engineer not being on the look out when rounding the curve, and that if he had been on the look out at the time there would have been sufficient time for him to stop the engine before striking the cattle.

The defendants' counsel moved for a nonsuit upon

objections taken at the trial and reserved, and a rule was subsequently granted, which was argued in this term by *Miller* for the plaintiff, and by *Crooks, Q. C.*, for the defendants. This argument was similar to that given ante p. 29, 30.

In this term, June 25, 1875, WILSON, J., delivered the judgment of the Court.

We have read the evidence carefully over given on the second trial. It does not differ materially from that which was given on the first trial. It is rather fuller, and the attention of the jury was more directly drawn to the real points of importance.

The result of their finding is, to acquit the plaintiff of all blame, and to cast it wholly upon the defendants.

We do not feel satisfied they were right in holding the plaintiff free from some blame, but however that may be, he would not be disqualified from recovering if, notwithstanding any failure upon his part, the defendants could, by the exercise of reasonable care upon their part, have avoided doing the injury which is complained of.

The evidence fully warrants the finding of the jury on this latter part of the rule which governs in such cases, and we cannot say we are dissatisfied with the verdict for the plaintiff.

The damages assessed of \$450 were admitted to be a proper allowance if the plaintiff were entitled to a verdict at all; and we think he is. Our former judgment stands in all respects with this addition to it.

The rule will be discharged.

*Rule discharged.*

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## THOMPSON V. THE GRAND TRUNK RAILWAY COMPANY.

*Railway crossing—Cattleguard encroaching on highway—Accident—  
Liability—Contributory negligence.*

The plaintiff, on a dark night, intending to go to the railway station, walked along the highway until he came to the railway crossing, and then turned to the left intending to go along the track to the station, when he fell into the cattle guard, which was within the limits of the highway, and was injured.

*Held*, that he could not recover, for assuming that the encroachment on the highway by the cattle-guard was illegal, it was in no way the cause of the accident, which resulted from the plaintiff leaving the highway to walk along the track, and would have happened without such encroachment.

DECLARATION. First count: that the defendants' railway, crossed the public highway in the township of Biddulph, upon which highway the defendants had constructed a culvert or cattle guard for the purposes of their railway: that it was the duty of the defendants to have sufficiently guarded, covered, and protected the cattle guard or culvert, to prevent injury or damage to persons lawfully passing in and along the highway: that the defendants wrongfully, and contrary to their duty in that behalf, suffered the culvert or cattle guard to be and continue, and the same was at the time of the injury wholly unguarded and without any light, railing, covering, or protection; and by reason of the premises, the plaintiff, while passing in and upon the highway during the night time, fell into the cattle guard or culvert and broke one of his arms, and was otherwise injured, and was prevented from attending to his business, &c.

Second count: that it was the duty of the defendants to maintain and keep the said highway at the level crossing of the railway in good and sufficient repair, and not to suffer the same to be out of repair: that not regarding their duty in that behalf, said defendants suffered and permitted the said highway, at the said level crossing of the railway, to be out of repair, whereby the plaintiff, who was lawfully walking in and upon the highway at the said level crossing, was thrown down and broke one of his arms, and was otherwise injured, and incurred expenses, &c.

Plea: not guilty, by statute.

The cause was tried before Burton, J., at Toronto, at the Fall Assizes of 1874.

It appeared from the evidence given on the trial that the plaintiff had been travelling on the defendants' railway, and left it at a station at the village of Grafton, owing to the conductor refusing to carry him on the ticket he then presented any further: that he walked from the station to an hotel, and after having had supper, he started for the train. It was then very dark. He walked in the centre of the road till he reached the railway crossing, and then he saw a light at the station. He then turned to the left towards the station, and, as he stated, he had not proceeded far before he fell into a hole. It was not guarded in any way, and it was on the allowance for road. One Foreman helped him out and took him to the station, and a doctor was sent for. His right arm was broken. On the following Sunday his arm was set.

On cross-examination, the plaintiff stated he went down to the rails in the centre of the road, and then turned to the left, and on one side of the outside rail, towards the station, as straight as he could, when he saw the light—and was travelling not along but across the highway—and he was trying to leave the highway and go along the track to the station. The first time, he went up to the hotel by himself and returned by himself. The second time, a Mr. Armstrong was with him. He said that he was afraid of the ditch on the side of the road, until he got to the railway track, where he supposed the ditch would not extend. He stated the injury would not have occurred if he had not gone on to the track, or attempted to do so: that he did not want to go on the track between the rails, but along the track across the highway: that he went to see the place he fell in, to have a sketch made of it. The ditch was not nearly as deep as the hole: the ditch was made by throwing up the road: that he did not know that the cattle guard was there: that he fancied that he struck against the rail and broke his arm.



*Foreman*, who helped the plaintiff out, stated, that on his way home he saw a man, the plaintiff, fall into the cattle guard: that he saw him just before he fell in: that he took him to the station and went for a doctor: that he found him on his knees at the bottom of the cattle guard, about eight feet—the cattle guard is not fenced, and is on the public highway: that it was about half-past eight p.m. when plaintiff fell in; the witness was at the time walking three or four yards behind the plaintiff, and in the same direction: that he saw him turn to go up the track. The only way to cross the cattle guard would be the timber supporting the rails, or the timber on the sides. The level of the railway is higher than the road; the latter being raised to the level of the railway. It was too dark for a stranger to see the gate leading into the station. Plaintiff crossed on the outside girder, not on the rail. This witness said it was so dark, that a person three or four feet away could not be recognised.

The proprietor of the hotel was called, and said that the plaintiff intended going by a train passing the station at 8-45 p.m. He left the hotel ten or fifteen minutes before the train passed, in ample time to get down to the station: that the cattle guard is on the concession line: that it was dangerous crossing by the cattle guard: there was a plank alongside the rails outside of them: the road before the railway was built was level: the railway is about six feet above that level, but the road on both sides is brought up to the level of the railway: that the culvert has since been almost filled up and made on the defendants' own property, and the road is safer now; there is a ditch on each side of the road.

A plan was produced shewing the position of the cattle-guard—7 feet 8 inches deep, 6 feet 5 inches wide, and the width of the highway between the cattle guard is 37 feet 6 inches, with a fence running from the ends of the cattle-guard to where it meets the line fence of the concession.

At the close of the plaintiff's case, defendants' counsel contended that the plaintiff failed to make out a case: that

it was not shewn that it was the defendants' duty to fence the cattle guard, or that they were insufficiently or improperly constructed; and it was not shewn that the highway was out of repair: that the plaintiff was not lawfully passing in and along the highway at the time of the accident, and that he contributed to the accident by unnecessarily turning from the highway to the railway track, that not being the proper way to the station.

The learned Judge reserved leave to the defendants to move to enter a nonsuit.

The learned Judge left the case to the jury on the question of contributory negligence, and there was a verdict for the plaintiff, and \$1,500 damages, on the first and second counts.

During last Michaelmas term, November 18, 1874, *J. B. Read* obtained *rule nisi* to set aside the verdict, and enter a nonsuit on the leave reserved, or for a new trial, the verdict being contrary to law and evidence, and on the ground, as to the first count, that the injury complained of did not arise from any act of the defendants: that the plaintiff was not lawfully using the highway, and that no breach of said count was shewn: that the cattle guard was sufficiently protected, and as to the highway, that it was not out of repair; and that there was contributory negligence on the part of the plaintiff, in attempting to cross the cattle guard and go to the station on the railway; and for misdirection of the learned Judge, in ruling that putting the cattle guard in the limit of the highway was an illegal act, and, if illegal, defendants would be liable if anyone was injured while attempting to cross it.

June 1, 1875. *Harrison*, Q.C., shewed cause. The plaintiff should not have been put off the train. His ticket was not limited. There was a direct conflict of oath against oath, and the verdict should not be disturbed. The direction of the learned Judge was not incorrect. He cited *Craig v. Great Western R. W. Co.*, 24 U. C. R. 504;

*Briggs v. Grand Trunk R. W. Co.*, Ib. 510; *Fairbanks v. Great Western R. W. Co.*, 35 U. C. R. 523; *Regina v. Train*, 2 B. & S. 640; *Soule v. Grand Trunk R. W. Co.*, 21 C. P. 308; *Green v. Town of Canaan*, 29 Conn. 157; *Greenland v. Chaplin*, 5 Ex. 243, 248; *Clayards v. Dethick*, 12 Q. B. 439; *Williams v. Town of Clinton*, 28 Conn. 264; *Shearman & Redfield on Negligence*, 3rd ed., secs. 413, 414, 452, 453; *Foulger v. Steadman*, L. R. 8 Ex. 65.

*M. C. Cameron, Q.C.*, contra. There is no evidence of how the road was before the railway was built, and no evidence whatever of negligence in the defendants. The case of *Fairbanks v. Great Western R. W. Co.*, 35 U. C. R. 523, is distinguishable. There the defendants had notice, and the plaintiff was walking across the track and not along it, as this plaintiff was. The road here had been as it was for twenty years. Contributory negligence is plainly proved.

June 19, 1875. MORRISON, J., delivered the judgment of the Court.

The evidence in this case discloses the following facts: [Here his lordship stated the facts as above given.]

It was contended on the part of the plaintiff, that the defendants having thus encroached upon the limits of the highway did an illegal act, and that the plaintiff having fallen into the cattle guard, as stated, the same being made within the limits of the road allowance, the company were liable for the injuries the plaintiff received.

No evidence was given that the cattle guard itself was improperly constructed, or that by the railway crossing the highway was impaired in its usefulness.

By the 13th section of the Railway Act, the company is required "to erect and maintain cattle guards at all road crossings, suitable and sufficient to prevent cattle and animals from getting on the railway."

And by the 150th section, "At every road and farm crossing on the grade of the railways, \* \* the crossing shall be sufficiently fenced on both sides of such points, so as to allow the safe passage of the trains."

And by the 18th section, "No person other than those

connected with, or employed by, the railway, shall walk along the track thereof, except where the same is laid across or along a highway."

It may be that the defendants were liable to be indicted for the encroachment on the highway as a nuisance, although the fact that the municipality allowed the encroachment to exist for a period of over twenty years, would go to shew that it was not considered to be a nuisance; but in the view we take of the case, assuming that the making the cattle guard by the defendants within the limit of the road allowance was an illegal act, the narrowing of the highway by the cattle guard was not the cause of the accident, nor did it in any manner conduce to it.

The injury which the plaintiff received, in our opinion, was the result of his own voluntary act—carrying out his intention to go to the station by walking along the defendants' track, from its intersection on the highway at the crossing. The plaintiff must have known before he came to the crossing, that it could not have been the regular road or way to the station.

In all probability, what he did was done with a view of saving time in getting to the station, by passing down the track. The night being dark, and in the hurry of reaching the station, he walked on without thinking of a cattle guard, or, if he did know of its existence, imprudently attempted to cross it. He fell in, and the injury in question resulted.

The cattle guard was fenced from its ends to the fence on the line of the concession, as shewn in the plan produced at the trial, so that a person walking along the highway at the crossing could not get into the cattle guard without intentionally leaving the travelled part of the highway at the rails, and walking into it as the plaintiff did.

We cannot see upon what ground or principle, under these circumstances, the defendants can be held liable, or that it can be said the accident happened through any negligence on their part. The suggestion that the narrowing of the highway by the cattle guard was the cause of the accident, seems to me untenable. If the cattle guard had not en-



croached on the highway, the result in the plaintiff's case would inevitably have been the same. His intention and object, when he turned on the railway track at the crossing, was to leave the highway, passing along the track to the station, and he would necessarily fall into the cattle guard.

Assuming that the plaintiff was aware that there was a cattle guard at the crossing, in that case he himself was clearly the cause of the mischief; and assuming that he was ignorant of its existence, and so supposed he was walking along the usual ballasted track, his ignorance could not render the company liable. The fact that it was a very dark night makes the plaintiff's act the more imprudent and rash.

Some witnesses stated that the cattle guard was dangerous. All cattle guards are dangerous in one point of view, if persons will venture to pass over them, and that is what we take the witnesses to mean. The cattle guard is made to prevent animals passing from the highway on to the track, and is for the safety of the travelling public, and constructed as an open deep cutting, fenced from its ends, so as to impress such a sense of danger in animals as will deter them from attempting to cross it.

There is no obligation on the company to place a gate across cattle guards, or have them lighted at night. It would be intolerable and unreasonable if such a duty was cast upon them, for we all know, from our system of concession and side lines, how very numerous are the public highways that our railways must intersect.

On that point, however, it is sufficient to say that the Legislature has not thought fit to impose such a duty. It is also to be borne in mind that the Legislature have prohibited strangers from walking on a railway track, which this plaintiff was doing, and intended proceeding along it to the station, when the accident happened.

On the whole, we are of opinion that there is no ground for holding that the injuries received by the plaintiff resulted from any negligence on the part of the defendants. The rule will be absolute to enter a nonsuit.

*Rule absolute for a nonsuit.*

## CATHCART V. HAGGART.

*Appropriation of payments—Statute of Limitations.*

In an action by an executor for services rendered by the testator as a labourer, on a monthly hiring, extending over many years, it appeared that payments had been made on account, at irregular intervals, both to the testator and to the plaintiff after his death, without any specific appropriation either by the defendant or the payee.

*Held*, that the plaintiff was entitled to have such payments applied to the earlier items which had become barred by the statute.

*Quære*, there being only the one claim, for continuous services, whether a jury might not infer that such payments were made on account, so as to take that part of the claim prior to the six years out of the statute.

**ACTION** for work and labor, &c.

Pleas: Never indebted, payment, and the Statute of Limitations.

The case was taken to trial at the Assizes, when a verdict was taken subject to an award.

The arbitrator made his award, and stated a case for the opinion of the Court, viz., that the action was one for wages brought by the executor of the testator, who had been in the employ of the defendant as a laborer on a monthly hiring for a number of years previous to his death: that payments were made by the defendant from time to time to the testator during his term of service, and to his executor, the plaintiff, after his decease; and that such payments were in all cases so paid by the defendant and received by the testator and his executor without the same being so paid or received specially for any particular year or term of service, or appropriated by the defendant at the time of payment in payment of any portion of the testator's service: that he, the arbitrator, appropriated the payments which were made by the defendant to the sum payable for the earlier months of service of the deceased in point of time, and which was previous to six years before the commencement of this suit: that he found that the payments so made to the testator were made from time to time at irregular intervals, extending over the whole period

of service : that the dates of payment of the said moneys, &c., which were proved before him, were made at the respective times mentioned in the particulars of the defendant's set-off and the plaintiff's claim attached to the record ; that such payments were paid on account of wages, and under the hiring mentioned in the award, and that they were not, at the several times of the payment thereof, appropriated by the defendant to the payment of the wages of the testator which accrued for any specified portion of his services under such hiring : that if the Court should be of opinion that the payments made from time to time by the defendant did not take the amount due for the services performed by the testator previous to six years before such respective payments, out of the operation of the Statute of Limitations, then he found the verdict should be for the sum of \$450, but if the Court should be of opinion that the payments made by the defendant from time to time had the effect of taking the amount due for services performed by the testator previous to six years before the making of such respective payments, out of the operation of the statute, then he found the verdict should be for the sum of \$921.

December 3, 1874, the case was argued before Morrison, J., sitting alone, by *Osler* for the plaintiff, and by *Defoe* for the defendant.

June 19, 1875, MORRISON, J.—I am of opinion, from the report of the arbitrator and the case as stated, that the verdict should be entered for the sum of \$921, as it appears that the testator was in the employment of the defendant for a number of years continuously previous to his death, and that payments were made by the defendant to the testator during such period of service, from time to time, at irregular intervals, and to the plaintiff as executor after his decease ; and that such payments were made by the defendant, and received by the testator and the plaintiff, without any appropriation by the defendant at the times of such payments.

I think it is clear from the cases of *Bosanquet v. Wray*, 6 Taunt. 596, *Philpott v. Jones*, 2 A. & E. 41, and *Mills v. Fowkes*, 5 Bing. N. C. 455, that all these payments being made on account of the hiring and services of the testator, and no appropriation being made of them by the defendant the plaintiff was entitled to have them applied as payments made on account, and for the earlier services of the testator.

As said by Bosanquet, J., in giving judgment in *Mills v. Fowkes*, at p. 463: "At the time of the payment, no appropriation was made by either party; but as the debtor made no appropriation, the creditor might appropriate the payment at any time before the action commenced; and he had every motive for applying it to the debt for which he had no remedy at law. \* \* \* It was not necessary he should manifest the appropriation by any specific act, and as he had an interest and the right to make the appropriation, I think he is entitled to judgment."

And Erskine, J., said, p. 464, "If the debtor does not expressly apply the payment to the more recent debt, the law gives the creditor the right to apply it to the older; and the creditor would apply it to the older debt, for the very reason which leads the debtor to apply it to the more recent."

Independently of the non-appropriation by the defendant, considering that the testator had only one claim, and that for continuous services during which the payments were made, I am not prepared to say that there was not evidence from which a jury could infer that such payments were made on account, so as to take the balance of the claim for service prior to the six years out of the operation of the statute. Vide *Walker v. Butler et al.*, 6 E. & B. 506; *Evans v. Davies*. 4 A. & E. 840.

On the whole, I am of opinion the verdict should be entered for the plaintiff for the sum of \$921 so found by the arbitrator.

*Judgment for the plaintiff.*



MEMORANDA.

During this term the following gentlemen were called to the Bar:—ALFRED HOWELL, HENRY CARSCALLEN, JOHN BUTTERFIELD, JOHN ALEXANDER MACDONELL, WILLIAM FRANCIS ELLIS, MORTIMER AUGUSTUS BALL, JOHN TURNBULL SMALL, OLIVER AIKEN HOWLAND, ALEXANDER MANSEL GREIG, ADAM RUTHERFORD CREELMAN, JOHN GUNN ROBINSON, JOHN STEWART TUPPER, JOHN HIGHETT THOM, JOHN DAVIDSON LAWSON, CHARLES JAMES FULLER, EDWARD STONEHOUSE.

## IN THE COURT OF ERROR AND APPEAL.

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NICKLE (Plaintiff in the Court below) *Respondent*, and  
DOUGLAS (Defendant in the Court below) *Appellant*.

*Assignment of bank stock—Appeal to the Court of revision—Appeal.*

*Held*, affirming the judgment below, 35 U. C. R. 126, that bank stock owned by a resident of Kingston in the Merchants' Bank, which had its chief place of business in Montreal, was personal property owned out of the Province, and therefore exempt from taxation; and that the assessment of such stock being wholly unauthorized and void, the owner was not bound to appeal against it to the Court of Revision, and was not estopped by having so appealed.

APPEAL from the judgment on demurrer in this case, reported 35 U. C. R. 126, where the pleadings will be found fully set out.

The main question in dispute was whether bank stock owned out of the Province was personal property liable to assessment under 32 Vic., ch. 36, O. It was held by the Court below that it was exempt.

The issues of fact were struck out by order, and upon consent judgment was entered for the plaintiff in the Court below, from which the defendant appealed, on the following grounds:—

1. That the, property, which was declared exempt from taxation by the Court below, was in the year 1873 liable to be assessed as personal property within the City of Kingston to the owner, the respondent, he then being a resident of that city, and having his domicile and place of business there; and he was so liable, although the head or chief office of the bank was placed in Montreal, out of this Province, for the said property being personal property in fact and also by statute, and so following the person, and being governed by and subject to the law

of the domicile of the owner, had existence and effect in this Province and within the said municipality, so as to be assessable to the respondent as personal property, in and by operation of law, and was governed by the laws in force here, and was fully in the respondent's possession and control here, and would have vested in his assignee in insolvency here, and on his death intestate would have been distributed under the laws of the Province of Ontario, and also might have been levied upon for the respondent's debts here equally with his other personalty under an execution against him, and must have been taken account of by the assessors of the said municipality as personalty liable to assessment within the municipality.

2. That the charter of the said Merchants' Bank extends over the whole Dominion which forms its chief business domain, and the same Bank may by law open branches or agencies and offices of discount and deposit, and transact business at any place in the Dominion, and may also establish offices for the transfer of stock at any of such branches.

3. That Bank stock is incorporeal personal property, and is intangible, and has no visible existence, and can only have a locality with the owner at his domicile, and has no other or fixed locality.

4. That the stock vests immediately on subscription, wherever this may be made, and could be the subject of a pledge or an effectual transfer and vest as property in this Province before reference had to the head office; and transactions respecting it entered into here, and before formal transfer at the chief office, affect it as property, and might be enforced in the proper tribunal here.

5. That the head office or chief place of business being situated in the Province of Quebec, is a mere matter of convenience, and does not, while the bank charter includes this Province, fix the *situs* of the property in question out of this Province, and in the Province of Quebec, or remove the said property apart from the person of the owner, being a resident of this Province; and to assume the contrary seems arbitrary, while there is no statutory enactment to that

effect, and there is a well established rule of law to the contrary, and that the property is diffused wherever the bank does business is against such a conclusion.

6. That by the proper construction of sections 39 and 41 of 32 Vic., ch. 36, O., personal property, *wheresoever situate*, is to be assessed to the owner in the municipality or ward in which he has his place of business or residence, as the case may be; and it does not appear that the respondent had any place of business or residence out of Kingston in the year 1873, or that he was in the said year assessed for the said property elsewhere than in the said city.

7. That if the *situs* of bank stock depended upon the location of the office of transfer, the directors of the bank might, by establishing or abolishing transfer offices in this Province, bring into or send out of this Province large amounts of such property without reference to its owners.

8. That section 9, sub-section 18, of 32 Vic., ch. 36, O., refers to and must mean personal property within this Province, the owner of which resides out of this Province, the words being "personal property *owned* out of this Province," not "personal property *situated* out of this Province," and the Court below has construed the word "owner" as if it were synonymous with the word "situated," which it obviously is not, the word "owned" having a direct reference to the owner's place of residence, which, and not the *situs* of the property, is where the property is owned, according to the ordinary meaning and acceptance of the phrase.

9. The assessment laws cannot affect property not in this Province; and if the property was out of this Province, as the Court below held, the said assessment laws could not apply to exempt such property from assessment, for our Legislature had no jurisdiction in such a case; and if the property was in the Province, then it was not exempt, as the special government tax on bank issues was abolished at the time of the assessment of said property, and the property became liable to assessment here. If the assessment laws of this Province did not apply, then it would seem from



the judgment of the Court below that there was nothing to prevent the operation of the rule of law that personal property follows the person, and as the ground of the judgment of the Court below is that this rule, seemingly owing to the Assessment Act, does not apply in the present case, and that the said property was at the head office of the Bank of Montreal, in the Province of Quebec, and was therefore exempt by the statute from assessment here, such judgment is erroneous, our assessment laws having no application if the property was at Montreal; and if it was not there, but at Kingston, then there was no exemption.

10. To hold that our Legislature intended to favor investors in foreign institutions and enterprises as against investors in our local institutions and enterprises, by exempting the stock held in the former from assessment (though allowing the dividends to be assessed), while authorizing the assessment of the stock held in the latter to its full value, is erroneous.

11. And further, that the respondent having appealed from the assessment in question to the Court of Revision of the said municipality, which court decided the appeal against him, and having then appealed from the decision of the Court of Revision to the County Judge of the County of Frontenac, who also decided such appeal against the respondent, he was and is bound by such decision of the County Judge, and such decision was final and conclusive.

12. The respondent was liable to be assessed at least for the stock dividends, and having been assessed for more than that his case was one of over assessment only, and for the Court of Revision.

13. That the action in the Court below did not lie against the appellant.

14. That it was not necessary for the appellant to shew that the Merchants' Bank had a branch agency or office or that they transact business in this Province, or that they have a transfer office in this Province, it being sufficient that the Bank's charter covered the whole Dominion.

15. That if, under the Administration of Justice Act,

the Court could have upheld the assessment and levy as to the dividends, it did not.

The appellant relied on the following authorities :—*Marshall v. Pitman*, 9 Bing., 595 ; *Allen v. Sharp*, 2 Ex., 352 ; *Durrant v. Boys*, 6 T. R. 580 ; *Hutchins v. Chambers*, 1 Burr. 579, 587 ; *Earl of Radnor v. Reeve*, 2 B. & P. 391 ; *Patchett v. Bancroft*, 7 T. R. 367 ; *Scragg v. The Corporation of the City of London*, 26 U. C. R. 263 ; *Corporation of the City of Toronto v. The Great Western R. W. Co.*, 25 U. C. R. 570 ; *McCarrall v. Watkins*, 19 U. C. R. 248 ; *Niagara Falls Suspension Bridge Co. v. Gardner*, 29 U. C. R. 194 ; *Pedley v. Davis*, 10 C. B. N. S. 492 ; *Spry v. McKenzie*, 18 U. C. R. 161 ; *Churchwardens, &c., of Birmingham v. Shaw*, 10 Q. B. 868 ; *Brittain v. Kinnaird*, 1 Bro. & Bing. 432 ; *Williams v. School Trustees of Sec. 8 of Plympton*, 7 C. P. 559 ; *In re Ewin*, 1 Cr. & J. 151 ; *Somerville v. Somerville*, 5 Ves. 750, 786 ; *Bruce v. Bruce*, 6 Bro. P. C. 566 ; *Attorney-General v. Napier*, 6 Ex. 217, 220 ; *Thomson v. Her Majesty's Advocate General*, 12 Cl. & Fin. 1, S. C. 13 Sim. 153 ; *Bruce v. Bruce*, 2 B. & P. 229 (note) ; *Re Goodhue*, 19 Grant 366 ; *Smith v. Knight*, 18 Grant 492 ; *Sill v. Worswick*, 1 H. Bl. 665, 690 ; *Williams on Executors*, 7th ed., vol. ii., 1637,–1644 ; *Humble v. Mitchell*, 11 A. & E. 205, *Williams on Personal Property*, 8th ed., 7,270 ; Consol. Stat. C., ch. 70 ; British North America Act of 1869, sec. 91, sub-sec. 15, sec. 92, sub-secs. 2, 8, 13, 16 ; Assessment Act of 1869, O, secs. 4, 9, sub-secs. 16, 18, secs. 36, 39, 41, 55, 60, sub-secs. 1, 2 and 4, secs. 61, 63, and secs. 69, 175, 176, 180 ; 24 Vic., ch 89 ; 34 Vic., ch. 5, D. secs. 15–19, &c., *Harrison's Mun. Manual*, 3rd ed., 588, note i ; *Rex v. The Mayor, &c., of Norwich* 1 B. & Ad. 310 ; *Regina v. The Mayor of Rochester*, 7 E. & B. 910–924 ; *Corporation of the Township of Whitby v. Harrison, &c.*, 18 U. C. R. 603 ; *Municipality of Whitby v. Flint*, 9 C. P. 449.

The reasons against the appeal were as follows :—

1. That the property which the respondent claims was exempt from assessment and taxation in the City of King-

ston in the year 1873 was stock in the Merchants' Bank of Canada, and as such was "personal property owned out of this Province," and exempt from assessment and taxation by virtue of the assessment laws then in force in this Province: Assessment Act, 1868-69, sec. 9, sub-sec. 18, O.

2. That the head office of the Merchants' Bank is placed at Montreal; the stock is transferable at the head office; the dividends are payable there; the business of the bank is managed there; the meetings of shareholders are to be held there; all questions involving reasonable doubts respecting the transmission of shares are to be decided by the Superior Court for the Province of Quebec—thus showing that the locality of the stock is *out* of this Province. Notwithstanding the maxims, *notabilia sequuntur personam*, personal property has a locality, and in the case of the Merchants' Bank stock that locality is in the Province of Quebec: 31 Vic., ch. 84, secs. 6, 15, 18, 19, 35; *Attorney-General v. Hope*, 1 Cr. M. & R. 530, 559; *Moreton v. Milne*, 6 Binn. R. 353, 361; *Story*, Conflict of Laws, 7th ed., sec. 383.

3. As by a legal fiction personal property is supposed to follow the domicile of the owner, the Legislature expressly, it would appear, to counteract this fiction, declared such property should be exempt from taxation in this Province, the reason being plain, that otherwise it would be liable to taxation twice—once where it is actually situated, and again in this Province where it is supposed to have followed the owner.

4. There is nothing in the pleadings to shew that said bank has opened any office in this Province where transfers can be made, and in point of fact no such office has been opened.

5. The sections in the Assessment Act which declare that personal property wheresoever situate is to be assessed against the owner in the municipality where he has his place of business or residence, as the case may be, must be construed to mean personal property wheresoever situate and not declared by statute exempt from assessment.

6. It is clear that sec. 9, sub-sec. 18, 32 Vic., ch 36, O., which exempts from assessment and taxation "all property, real or personal, which is owned out of this Province," cannot mean property situate in the Province and the owner of which lives out of the Province, because real property is mentioned as well as personal, and if the appellant's contention be correct, the provisions of the Act with regard to the assessment and taxation of non-resident lands would in very many cases be useless. No question has ever been raised as to the legality of the tax against *real property* in the Province the owner of which lives *out* of the Province. Provision is also made for the assessment of personal property, the owner of which lives out of the Province, against the agent who has possession or control of it. If the appellant's view be correct, that the word "owned" has a direct reference to the owner's place of residence and not to the situs of the property, and that personal property follows the domicile of the owner, it is submitted that the sub-section is unnecessary, because in the case of a person living out of the Province his personal property is not in the Province, and therefore not liable to taxation at all, the Assessment Act only declaring that real and personal property in the Province shall be liable to taxation, subject to the exemptions mentioned: Assessment Act, 1868-69, secs. 9, 34-42.

7. The property in question being really situated out of the Province, but by a legal fiction supposed to be in the Province, the Legislature evidently intended to remove all doubts on the question by expressly exempting property of this nature from taxation, and had jurisdiction and authority to do so.

8. Every tax or charge must be imposed by clear and unambiguous language. Acts of Parliament imposing a burden must be critically construed; and "where there is an ambiguity it must be in favour of the subject." If the Assessment Act does not exempt the property in question, it is ambiguous and by no means clear that stock in banks having their head office out of Ontario should be liable to



taxation in this Province, and therefore the construction of the Assessment Act as to this point should be in favour of the subject: *Duarris on Statutes*, 2d. ed., p. 646; *Dock Company at Kingston upon Hull v. Browne*, 2 B. & Ad. 43.

9. There are no enacting words in the Assessment Act making bank stock liable to taxation, even if the exemption was repealed.

10. The fact of the respondent having appealed to the Court of Revision, and from their decision to the County Court Judge, cannot give jurisdiction to those Courts if none existed, nor can it make property liable to taxation which is by law exempt; otherwise the Court of Revision and County Court Judge would be able to impose a tax unauthorized by the Legislature. It is an *illegal* assessment which the assessors had no power to make, nor the Court of Revision nor the County Court Judge to confirm; *Great Western R. W. Co. v. Rouse*, 15 U. C. R. 168; *Niagara Falls Suspension Bridge Co. v. Gardner*, 29 U. C. R. 194; *Regina v. Court of Revision of the Town of Cornwall*, 25 U. C. R. 286; *Governor of Bristol Poor v. Wait*, 1 A. & E. 264; *Groenvelt v. Burwell*, 1 Ld. Raym, 454, 471; *Weaver v. Price*, 3 B. & Ad. 409; *Milward v. Caffin*, 2 W. Bl 1330.

11. Under the pleadings in this cause the question does not arise as to whether the respondent is rightfully or wrongfully on the roll, but the issues joined on the demurrers fairly raise the question—Is the bank stock for which he has been assessed liable to taxation?

12. The respondent does not complain of an “undercharge or overcharge by the assessors,” but that he is taxed upon certain property which is by law exempt, and that he is not bound to apply to have the illegal assessment struck out, and that if he does not make such application his conduct will not change the law or give jurisdiction when none existed. The assessment is a *nullity*. The property in question is distinguishable upon the roll from the other property for which the respondent is assessed: *Munici-*

*pality of the Township of London v. Great Western R. W. Co.*, 16 U. C. R. 501; *S. C.* 17 U. C. R. 262; *Shaw v. Shaw*, 21 U. C. R. 432; *Shaw v. Shaw*, 12 C. P. 456; *Charleton v. Alway*, 11 A. & E. 993; *Municipality of Berlin v. Grange*, 1 E. & A. 279.

13. The question as to the dividends from this particular bank stock was not raised by the pleadings; and even if it was, they were subject to the same exemptions as the stock itself.

December 15, 1874 (a). The appeal was argued by *J. A. Boyd* for the appellant, and *G. A. Kirkpatrick* for the respondent.

The arguments of counsel and the cases cited by them did not differ materially from those in the report of the case in the Court below, and sufficiently appear from the reasons for and against the appeal.

June 15, 1875. BURTON, J.—It is not at all surprising that Courts have experienced a difficulty in placing an interpretation upon many of the clauses of the Assessment Act, and among others upon sub-sec. 18 of sec. 9, which professes to exempt from taxation all property, real or personal which is owned out of this Province.

It was strongly urged on the part of the appellant, that as real property, which the Legislature confessedly had no power to tax if situate out of the Province, was included in this exemption, the words “owned out of this Province” must of necessity apply to the residence of the owners, and the amending Act 37 Vic. ch. 19, which was passed chiefly for the purpose of setting the question of the assessment of bank stock at rest, so far from removing the difficulty seems to give legislative sanction to the interpretation contended for, by declaring in the first section that all real property situate within the Province but *owned out of the*

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(a) Present—DRAPER, C. J. of Appeal; STRONG, J.; BURTON, J.; and PATTERSON, J.

*Province*, adopting the very terms used in sub-sec. 18, shall be liable to assessment.

It is not, however, material in the view which we take of this case to consider that sub-section, inasmuch as the power to tax and the subjects of taxation are defined in sec. 9 as being restricted to land and personal property in the Province of Ontario, and it seems like a misapplication of terms to speak of something as exempt which was in fact never comprised within the description of property made liable to taxation. The important question for consideration is whether personal property of this description can be said to be within the Province.

The Legislature, in defining what description of property shall be liable to taxation, have used the following language: "All land and personal property *in the Province of Ontario* shall be liable to taxation."

Taking the words of the statute in their plain ordinary sense, they refer to the actual situs of personal property not less than to real estate, otherwise they would doubtless have used the words "all lands within the Province, and all personal property wherever situate owned by persons resident within the Province shall be taxable."

As regards personal property of a visible or tangible nature, such as cattle and chattels in the popular sense of the term, and which are capable therefore of an actual situs, and differing only from land in the fact that one is immovable the other movable from one place to another, there is very little difficulty; both are equally protected by the laws of the country where they are situated, and both are justly chargeable with a proportion of the local burdens of the place in which they happen to be according to all just principles of taxation.

I should have said, therefore, without the aid of sub-sec. 18, that the statute never could have contemplated the taxation of personal property of a tangible nature capable of actual situs, and not situate within the Province. But it admits of more question, whether the legal fiction of *mobilia sequuntur personam* does not apply to other personal property not having an actual situs.

The term personal property includes not only all goods and chattels, such things as I have referred to, but shares in incorporated companies, interest, dividends from bank stocks, money, notes, accounts and debts at their actual value, income and all other property, except land and real estate.

It is manifest that the debts due to a ratepayer from any person resident within the Province form part of his taxable property, and can it make any difference that the debtor resides beyond the limits of the Province?—they are still due to the creditor here, and the reasons which exist for excluding tangible personal property having a situs abroad and liable to taxation there have no application.

If the securities held for such debts were separate from the person and domicile of the owner in the hands of an agent in another country, it may well be that such property would be liable to taxation in the hands of such agent and might not be held to follow the owner, but I should incline to think that in other cases the actual residence of the debtor would not affect the question.

It is not, however, necessary in the view which I take of the nature of the particular property which is the subject of assessment in this case to decide this point, and I merely refer to it in order that I may not be taken to have pledged myself to that opinion, should the question ever arise for formal adjudication.

Bank stocks or shares in an incorporated bank differ from both of these; they may be themselves intangible, but they represent that which is tangible. They represent money or property invested in the capital stock of the bank, which capital is employed in business by the bank, and that business is generally carried on at a place other than the residence of the majority of the shareholders. The shareholder is protected in his person by the Government at the place where he resides, but his property in this stock is protected at the place where the bank carries on its business.

In the case of an ordinary partnership the partnership



property, whether tangible or intangible, whether consisting of goods or debts due to the firm, is assessed at the place where the business is located. It is not easy to see why upon the same principle a person may not be taxed in the case of his stock in an incorporated bank at its place of business; where the banks are situate within the Province, and a law can be made adopting a mode of taxation applicable to all, there may be no injustice in taxing the shares in the name of the owner at his usual place of residence, but where the bank is not within the Province, there are obvious reasons why it might be deemed right that a different rule should be adopted.

The country where the bank is situated has jurisdiction for the purpose of taxation through the property itself over all its shareholders, both resident and non-resident. Every shareholder takes the property subject to the power of taxation of the Legislature of the country where the property is situate, and every non-resident by becoming an owner voluntarily submits himself to the jurisdiction of the Legislature of the place where the bank is established. The money so invested becomes subject to the taxing powers of the country where in contemplation of law it is invested.

The same reasons which apply to the exemption of personal property of a tangible nature and capable of an actual situs apply with equal force to it, and although it was competent to the Legislature having jurisdiction over the person to tax his personal property wherever situate, when we find them using language which confines the assessment to personal property within the Province, and we hold that that cannot include tangible visible property of the nature to which I have adverted, it is no forced construction to hold that it does not apply to property of this description employed in another country, and which may have been already taxed under the authority of the Legislature where it is so employed.

The question is one of much difficulty, and I must confess that I at first entertained a different opinion, but I

concur in the views held by the other members of the Court, that property of this description is not liable to be assessed against the owner in the municipality in which he resides.

But the question still remains whether, if the plaintiff is not liable to be rated by reason of the property not being within the Province, the unauthorized rating furnishes only a ground of appeal to the Court of Revision and County Judge, and not for an action in respect of a levy made to enforce it; and whether by having elected to appeal he is not personally estopped by his own act, from objecting to the want of jurisdiction in any collateral proceeding.

We have then to consider, in the first place, what are the powers and duties of the assessors. They are, to prepare an assessment roll, in which they are to set down the names of all taxable persons resident within the municipality who have taxable property therein, and leave for every party named therein, resident or domiciled, or having a place of business within the municipality, a notice of the sum at which his real and personal property has been assessed, and upon such being done to deliver to the clerk of the municipality the assessment roll completed, with the certificates and affidavits required by the Act. The parties so placed upon the roll have the right to appeal to the Court of Revision, who are empowered to adjudicate upon all complaints in regard to persons wrongfully placed upon or omitted from the roll, or assessed at too high or too low a sum, and the roll as finally passed by the Court, except as to cases further appealed to the County Judge, is to be valid and to bind all parties concerned, notwithstanding any defect or error committed in or with regard to the roll.

The general principle is clear, that wherever a statute gives to certain persons the power of adjudicating upon a particular matter they alone can do so, and their decision excludes all further enquiry.

The question therefore is, whether under the words of this enactment the Court of Revision have jurisdiction;

and *Marshall v. Pitman*, 9 Bing. 595, was, among other cases, referred to and relied upon by the appellant. That case was cited and relied on for a similar purpose in the *Governors of the Bristol Poor v. Wait*, 1 A. & E. 264, 280, but was distinguished on grounds which on examination will be found to pervade and to reconcile all the cases which may at first sight appear to be contradictory, viz., that the Sessions there had a jurisdiction over the general subject matter, as distinguished from cases where there was no authority to make the assessment at all, either from the fact of the party not residing within the jurisdiction, or the property being something in respect to which no authority was given by the Act to make an assessment.

In the first case the party assessed was an inhabitant *residing and possessing personal property within the parish*. The Act rendered such property ratable. The overseers had a clear legal right to rate it. If it was unfairly rated, or if there was no profit from it so that under the statute of Elizabeth no rate should be levied, that was clearly a matter for appeal; but in the case of *Bristol v. Wait* the rate was imposed in respect of land which the plaintiffs did not occupy, a rate which the overseers had no power to make. It was said to be like a rate on land situate in a different parish, which, according to Holt, C. J., in *Groenvelt v. Burwell*, 1 Ld. Raym. 471, was an illegal rate which the Justices had no power to confirm.

*Weaver v. Price*, 3 B. & Ad. 409. was to the same effect, Lord Tenterden remarking, at p. 411, "There was not in this case any rate whereby the plaintiff could be duly assessed to the relief of the poor of the parish of Overton; for, in the result, it turned out that he was not an occupier of any land in that parish. That being so, the defendants had no authority to order any distress, \* \* They are therefore liable in trespass."

In *Bonnell v. Beighton*, 5 T. R. 182, on the other hand, a general power was given to commissioners to set out such roads as they should think necessary and proper, and a power of making a general rate on the proprietors for

the purpose of defraying the expenses of making these roads and the other purposes of the Act. Then having proceeded to put the Act into execution, and having found certain sums necessary to be disbursed, they made a rate. The Court were unable to distinguish it from the case of an assessment made by the overseers of the poor, in which they sometimes made improper charges, such as for feasting, &c.; but that it was never pretended that on that account the whole rate was to be considered illegal, and its legality discussed in an action of trespass, but it would constitute a ground of appeal.

In that case there was a provision that "if any person shall think himself aggrieved by any thing done in pursuance of the Act, he may appeal;" and in that case, by way of greater caution, it is added, "which determination of the Justices shall be final and conclusive on all parties concerned."

The judgment there proceeded upon the ground that the commissioners clearly had jurisdiction over the general subject matter. If in exercising that jurisdiction they included expenses which should not have been incurred, it was merely an excess, and consequently an objection to the *quantum* of the rate, which should have been discussed at the Sessions.

There are numerous cases to be found in the books in which the same distinction is drawn; but a case of *Allen v. Sharp*, 2 Ex. 352, in the Court of Exchequer, is sometimes supposed to be at variance with these cases, and to support the *dictum* of the present Chief Justice of the Common Pleas when delivering the judgment of the Court of Queen's Bench in *Scragg v. The Corporation of the City of London*, 26 U. C. R. 263, but it will be found on examination to be consistent with the decisions I have referred to. The power of appeal there, which by the original statute had been confined to overcharging and over-rating, had been extended by a subsequent enactment to *any* assessment.

Baron Parke himself, in *Allen v. Sharp*, 2 Ex. 365, recognizes the distinction by referring to the case of



*Weaver v. Price*, which he admits was rightly decided on the ground that the Justices had no power to grant a warrant for enforcing a rate assessed on a party who had no land in the parish, and distinguishing it from the case where a party is an occupier of land, but rated for too much, where, he says, the proper course is to appeal, and trespass will not lie; and to *Charleton v. Alway*, 11 A. & E. 993, where the assessors were bound to distinguish between the different descriptions of land; and not having done so, and the plaintiff having paid the assessment in respect of the portion for which he was legally assessed, was entitled to treat the other as a nullity.

Rolfe, B., in the same case, p. 367, is careful to guard against misapprehension as to the grounds of the judgment, and remarks: "Our decision is not that an assessment made without jurisdiction will bind, for instance, if an assessor were to assess a person living altogether out of his district, or dealing in something in respect of which the Act did not give any authority to assess him, the assessment might be questioned in an action."

I find no case in England opposed to this view, and the course of decision in our own Courts, from *Municipality of Berlin v. Grange*, 1 E. & A. 279, downwards, has been uniform; the only doubt raised being that thrown out by the present Chief Justice of the Common Pleas when a Judge of the Court of Queen's Bench, in *Scragg v. The Corporation of the City of London*, 26 U. C. R. 263.

That case can scarcely be said to be a decision on the point. Two questions were there argued on demurrers to separate pleas, viz., the liability of the property to assessment, and the power of the Court to review the decision of the Court of Revision. If the property was held liable, or if the revised assessment roll was conclusive, the defendants were entitled to judgment. Mr. Justice Hagarty gave judgment on both points for the defendants. The Chief Justice, the present Chief Justice of this Court, is simply stated to have concurred,—whether he agreed in the opinion on both questions, or merely concurred in

giving judgment on the demurrer for the defendants, is not stated; and Mr. Justice Morrison dissented and held that the plaintiff ought to have judgment, though he only gave his reasons on the first question, while in appeal the judgment proceeded entirely on the question of the liability of the property.

It is also to be noted that the decision that the roll was conclusive, is stated by Mr. Justice Hagarty to be given on the authority of the then latest decision of that Court on the subject, viz., the case of *Corporation of the City of Toronto v. Great Western R. W. Co.*, 25 U. C. R. 570, in which case no question of jurisdiction appears to have been involved, the dispute being as to what was in effect a matter of valuation. The Court there held that the reservation of a case by the County Court Judge for the opinion of the Court of Queen's Bench was simply inoperative, and that what the County Court Judge had done amounted to a confirmation of the decision of the Court of Revision.

We find, therefore, that since the passing of the Act 16 Vic. ch. 182, in which precisely similar language was used as to the jurisdiction of the Court of Revision and the right of appeal, the decisions have been uniform in favor of the view which we now take of the enactment, viz., that where the statute exempts property, or, which amounts to the same thing, where property is not within the province and not liable to be assessed, the assessor cannot assume jurisdiction and place such property on the roll. Were it otherwise it would in effect be transferring the power of taxation from the Legislature to these officers. We think that such an assessment is absolutely void, and consequently that the party who finds himself so assessed is not bound to appeal, but may treat it as a nullity.

We think that both upon principle and authority we should hold that the decisions in our own Courts upon this point are right, but did we even entertain a serious doubt of their correctness, the inconvenience that might result by unsettling the law and disturbing what was quiet, is so great that, adopting the language of Mr. Justice Blackburn,

in reading the opinion of the majority of the Judges in answer to the questions submitted to them by the House of Lords in *Jones v. The Mersey Docks*, 11 H. L. 443, at p. 477, "We agree that even a Court of Error should be slow to reverse decisions which, though originally wrong, have long been uniform. When such is the case, it may often be proper to persevere in the error, and leave the remedy to the Legislature."

If it should be thought better to make the assessment in all cases conclusive, it is easy to provide for it by an Act of Parliament, and in that case it might be thought desirable, where such large interests are involved, to provide some machinery for stating a case by the County Judge for the opinion of one of the Superior Courts.

Only one question remains. It was contended, and there is not wanting authority in support of such contention although I was surprised to find it, that having appealed the party had made his election.

It is true that Lord Denman, in giving judgment in *Church Wardens, &c., of Birmingham v. Shaw*, 10 Q. B. 868, uses this language at p. 880: "The party grieved may, if he please, appeal, because \* \* excess of jurisdiction is in itself a ground of appeal, as much as merely erroneous decision. And, if the Court of Appeal erroneously confirms the act of the Court below, it may be that the party appealing cannot object to the want of jurisdiction, in any collateral proceeding: his own act may estop him personally."

It was a mere *dictum* not necessary for the decision of that case, and opposed to the current of authority.

*Milward v. Caffin*, 2 W. Bl. 1330, decided in 1778, was a case in which the parties had first appealed, and it was contended that although not bound to do so, having adopted that course the decision of the Court appealed to was final. But the Court said, at p. 1331: "All that related to the assessment of lands not in the occupation of the plaintiff was *coram no judice*:" the Justices therein exceeded their jurisdiction, and their determination is a nullity."

That case, though questioned in a subsequent decision on another point, has never been doubted on this point.

This is the view entertained by the late Sir John Robinson in *The Great Western R. W. Co. v. Rouse*, 15 U. C. C. R. 168, 170, where he says: These clauses "only make the decision of the County Court Judge final in regard to such matters as are to be submitted to him: that is, any alleged overcharge or undercharge, or the wrongful insertion or omission of any person's name. \* \* The question is not whether the superstructure has been overvalued, but whether there was any authority for assessing it at all, and upon this point the judgment of the County Judge is not to be final. It is the Act of Parliament that must govern."

We agree in this view of the law, and we think that the judgment of the Queen's Bench should be affirmed and the appeal dismissed with costs.

PATTERSON, J.—I concur in dismissing this appeal on the grounds stated by my brother Burton, viz., that the bank stock in question was not assessable, because it was not "property in the Province of Ontario;" and that the question does not come to us as *res judicata*, because it was beyond the jurisdiction of the Court of Revision and the County Judge.

I shall merely add a few words as to my own views of the Assessment Act.

There are difficulties to be encountered in attempting to construe and apply some of the provisions of the Act; and notably in the reading of the singularly unhappy expression forming the eighteenth exemption under section 9: "All property, real and personal, which is owned out of this Province."

The general enactment of section 9 confines the assessment to "land and personal property in the Province of Ontario." No property out of the Province is in any case assessable.

It would, therefore, seem that the necessary construction



of sub-section 18 is to exempt property in the Province when its owner lives out of the Province.

It is difficult to believe that this effect can have been intended with respect to real property; yet, when it is noted that the Assessment Act of 1853, 16 Vic. ch. 182, as originally passed, and also as continued in Consol. Stat. U. C., ch. 55, did not contain an exemption in these terms; but contained the somewhat more intelligible one: "All property, stocks, and securities which any party may own out of this Province," and that the clause in its present form originated as an amendment of the law in 1866, the conclusion is strengthened that the meaning of sub-sec. 18 is that which I have suggested.

The Amending Act, 37 Vic. ch. 19, evidently treats the sub-section with respect to both real and personal property as having this meaning.

Whether this is the proper reading, or whether it is intended to denote property situated out of the Province, the owner living in the Province, as the original form of the exemption might indicate, is unnecessary to decide, so far as the question now before us is directly concerned. In either view the statute itself clearly excludes any question of the propriety of attributing to such property as stocks and securities a *situs* different from the domicile of the owner.

I am unable to understand the principle on which "notes, debts and accounts," and some other kinds of personal property enumerated in the fourth section of the Act, including shares in incorporated companies, are considered proper subjects for municipal taxation. In my view the law must be regarded, in relation to such property, as not resting on any general principle which can be invoked as a guide to its construction, but as depending for its application entirely upon the force of the language employed.

The right to tax is given by section 9, and extends only to property *in the Province*. The party asserting the right to tax has thus the onus thrown on him to shew that the property to be taxed is in the Province. Until this is

shewn no question of exemption arises, and therefore, as I have already said, the question of the true reading of subsec. 18 is unimportant.

Whatever may be held to be the *situs*, for assessment purposes, of "notes, debts, and accounts," if the point ever comes up for judicial decision, it is enough at present to say that, in my opinion, bank stock is property of a different character. It is not a mere *chose in action*.

If it cannot, with technical accuracy, be described as the interest of a partner in a mercantile business, it certainly partakes strongly of that character, and so gives to the contention in the present case the aspect of an attempt to tax a resident here in respect of that part of his capital which is invested in a business carried on by himself and his partners in Montreal.

For the reasons given by Mr. Justice Wilson in his judgment in the Court below, and those now given by my brother Burton, I think that not only have the appellants failed to shew that the stock in question is property in the Province of Ontario, but that it is affirmatively shewn that it never was property in this Province.

DRAPER, C. J. of Appeal, and STRONG, J., concurred.

*Appeal dismissed with costs.*

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CHARLES HOOD, (Plaintiff in the Court below,) *Appellant*,  
v. THE COMMISSIONERS OF THE HARBOUR OF TORONTO, (Defendants in the Court below,) *Respondents*.

*Obstruction by sunken pier—Toronto harbour—Liability of Commissioners.*

The decision in *Hood v. The Commissioners of the Harbour of Toronto*, 34 U. C. R. 87, affirmed on appeal, holding that defendants were not liable for injury to the plaintiff's vessel caused by running against an old sunken pier.

*Semble*, that the harbour was not by the Statutes vested in the commissioners, but only the works constructed for its improvement.

This case distinguished from *Mersey Docks and Harbour Board Trustees v. Gibbs*, L. R. 1 H. L. 93; *Winch v. The Conservators of the Thames*, L. R. 7 C. P. 458, 9 C. P. 378; *Parnaby v. The Lancaster Canal Company*, 11 A. & E. 223, and others cited, on the ground that here the harbour was a natural one open to the public as of right, not an artificial work erected by the defendants, and which they invited the public to use on payment of tolls.

*Held*, also, that under the Statute there was no duty imposed upon the defendants to employ the funds placed under their control, and the tolls which they were authorized to impose, in removing the obstruction complained of, which existed before their incorporation, but that a discretion was vested in them not to be controlled by a jury.

*Semble*, per BURTON and PATTERSON, JJ., the Court being empowered to draw inferences of fact, that there was no sufficient evidence to shew knowledge by the defendants that the place in question was dangerous to vessels.

Per PATTERSON, J., such power, to draw inferences of fact, when given by consent, is not confined to the Court below, but extends to this Court.

APPEAL from the judgment of the Court of Queen's Bench directing the entry of a nonsuit. The case below is reported in 34 U. C. R. 87, where the pleadings and facts will be found fully set out. The action was one on the case for negligence, and the question was whether the defendants, in whom the harbour of Toronto was vested by 13-14 Vic. ch. 80, were liable to the plaintiff for an injury to his vessel caused by running against a sunken pier at a point north of the windmill line in the line of Church Street, produced, which street did not extend to the water.

The following were the grounds of appeal and authorities supporting the same:—

1. The harbour of the city of Toronto is a public navigable body of water placed under the control of the defendants, who have power to collect tolls from persons using the harbour, and are obliged to keep the harbour in an efficient state of repair: 13-14 Vic. ch. 80; 3 Wm. IV. ch. 31, sec. 7, Revised Statutes of U. C., p. 551; 7 Wm. IV. ch. 64, Revised Statutes of U. C., p. 552.

2. For neglect of duty the defendants are liable to be sued by the person sustaining special or peculiar injury in consequence of the neglect: *Mersey Docks and Harbour Board Trustees v. Gibbs*, L. R. 1 H. L. 93. See also *Gibbs v. Trustees of the Liverpool Docks*, 3 H. & N. 164; *Manley v. St. Helen's Canal and R. W. Co.*, 2 H. & N. 840; *Hartnall v. Ryde Commisioners*, 4 B. & S. 361; *Ohrby et ux. v. Ryde Commissioners*, 5 B. & S. 743; *Winch v. The Conservators of the Thames*, L. R. 7 C. P. 458; S. C. in Ex. Ch., L. R. 9 C. P. 378; *Sweeney v. President, &c., of the Port Burwell Harbour*, 17 C. P. 574; S. C. in appeal, 19 C. P. 376; *Berryman v. President, &c., of the Port Burwell Harbour*, 24 U. C., 34; *Crandell v. Mooney*, 23 C. P. 212.

3. The harbour of Toronto consists of all the navigable waters of the bay, whether north or south of the invisible line called the windmill line, including the spaces between the wharves and the approaches thereto: 3 Wm. IV. ch. 31; 7 Wm. IV. ch. 64; 13-14 Vic. ch. 80; *Watson v. The City of Toronto Gas Light and Water Co.*, 4 U. C. R. 158. See also *Webb v. Port Bruce Harbour Co.*, 19 U. C. R. 615; *The Dock Company at Kingston upon Hull v. Browne*, 2 B. & A. 43; *Buffalo and Lake Huron R. W. Co. v. Goderich*, 21 U. C. R. 97; *Dixson et al. v. Snet-singer*, 23 C. P. 235.

4. The sunken pier in part on Church Street extended and in part on the Dixon water lot is in the harbour, and in the course of vessels navigating the harbour, and the neglect of defendants either to warn against the existence thereof or to remove the same, or that part thereof on Church Street extended, against which the plaintiff's vessel



struck, was actionable negligence on the part of the defendants: *Parnaby v. Lancaster Canal Co.*, 11 A. & E. 223; *Smith v. London and St. Catharine Docks Co.*, L. R. 3 C. P. 326. See also *Harmond v. Pearson*, 1 Camp. 515; *Williams v. Wilcox et al.*, 8 A. & E. 314; *Brown v. Mallett*. 5 C. B. 599; *White et al. v. Philips et al.*, 15 C. B. N. S. 245

5. The plaintiff in such a case may either sue the defendants, who are bound to keep the harbour in an efficient state of repair, or the person who caused the obstruction, and is not restricted to a remedy against the latter: *Parnaby v. Lancaster Canal Co.*, 11 A. & E. 223. See also *Mayor, &c., of New York v. Bailey*, 2 Denio 433; *Buffalo v. Holloway*, 7 N. Y. 493; *Chicago v. Robbins*, 2 Black, 418; *Rowell v. Williams*, 29 Iowa, 210. See also *City of Boston v. Worthington*, 10 Gray, 496; *City of Brooklyn v. Brooklyn City R. W. Co.*, 47 N. Y. 475.

6. There is nothing contained in the Toronto Esplanade Acts, 16 Vic. ch. 219, and 20 Vic. ch. 80, which in any manner interferes with the plaintiff's right to recover in this action.

The following are the reasons against the appeal:

1. The respondents are not liable for the injury complained of by the appellant, because the pier or crib which caused the injury is not within the limits of the harbour vested in the respondents: 13-14 Vic. ch. 80; 3 Wm. IV. ch. 31; 7 Wm. IV., ch. 64.

2. The pier or crib causing the injury was the property either of the city of Toronto, or of the private person named in the pleadings, under statute or grant from the Crown, and the liability was on one or other of these parties, and not upon the respondents: 16 Vic. ch. 219; 20 Vic. ch. 80.

3. The respondents could not control or interfere with either the city or private person owning this lot, in the use or misuse of it, and therefore are not responsible for the obstruction, which they had not the power or authority to remove: *Hood v. Commissioners of the Harbour of Toronto*, 34 U. C. R. 87.

June 21, 1875 (a). The appeal was argued by *Harrison*, Q. C., for the appellant, and *J. H. Cameron*, Q. C., for the respondent. The argument and cases cited were substantially the same as in the Queen's Bench, reported in 34 U. C. R., pp. 92, 93, 94.

September 15, 1876, DRAPER, C. J. of Appeal.

The acts of the Legislature defining the boundaries of the city of Toronto limit it on the south to the margin of the water. The boundaries of the *city and liberties* refer to the island or peninsula forming the harbour, and run "across the bay or harbour of York."

The statute of Upper Canada, 4 Wm IV., ch. 23, sec. 13, enacted that all that portion of the liberties of the said city (Toronto) lying between the margin of the water on the north side of the bay, east of the river Don and the southern limits of the said liberties, including the peninsula and the island, should constitute the port of Toronto. Nearly the whole of this statute, including section 13, was repealed by 12 Vic. ch. 80, and I have found no subsequent statutory declaration of the limits of the Toronto harbour.

The case of *Mersey Docks and Harbor Board Trustees v. Gibbs*, L. R. 1 H. L. 93, has established as the general rule of the construction of statutes like the one under consideration in that case, "that in the absence of something to shew a contrary intention, the Legislature intends that the body created by the statute shall have the same duties, and that its funds shall be subject to the same liabilities, as the general law would impose upon a private person having and exercising the same rights; and that the trustees in that case were bound to take reasonable care that their works were in such a state as that the public might use them without danger." Per Bovill, C. J., in *Winch v. The Conservators of the Thames*, L. R. 7 C. P. 458, at p. 470.

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(a) Present: DRAPER, C. J. of Appeal, STRONG, J., BURTON, J., PATTERSON, J.

In the same case in appeal, L. R. 9 C. P. 378, Bramwell, B., says, p. 388: "We must hold the funds of this corporation \* \* liable to make good the damages sustained by a private person from any breach of duty on their part, and that there is nothing in these statutes to exempt this corporation from the duties which the common law would cast upon a private person or a trading corporation."

And Cleasby, B., p. 382, who dissented from the judgment, says: "I quite agree that if certain duties are imposed upon the defendants, the circumstance of their being a public body, receiving their powers for public purposes only, does not protect them from the consequences of the neglect of their duties if danger arises to any person by the neglect."

We have then to enquire whether the defendants, upon the pleadings and the facts established, come within the rule thus established.

The plaintiff in each of the two counts of the declaration complains of a breach of duty on the part of the defendants in not keeping the harbour in reasonable repair and free from obstructions, alleging that the harbour was obstructed by a sunken crib and pier, of which they had notice and ought to have removed, or to have placed and maintained a buoy or other signal near the spot, so as to warn persons of the danger. Each count charges that the harbour and all the works and property constructed, purchased, and acquired in connection with it were vested in defendants; and the second count adds, that it was the duty of the defendants, under the statute 13-14 Vic. ch. 80, to procure plans and estimates for the improvement of the harbour.

The pleas are: 1. Not guilty. 2. A traverse of the duty alleged in each count; 3. That the sunken pier or crib mentioned in the first count, and the land on which it stands, were the property and freehold of one Dixon, and were not vested in the defendants, nor have they any jurisdiction, authority, or control over the said land, pier, or crib, or the waters covering the same. 4. A similar plea to the second count.

The port of York is mentioned in the statute of Upper Canada, 7 Geo. IV. ch. 9, and two Acts were passed by the same Legislature for the improvement of the harbour, 3 Wm. IV. ch. 32, and 7 Wm. IV. ch. 64, the first of which granted £2,000, to be expended by three commissioners appointed to superintend the construction of such works as they should think necessary for the "improvement and preservation of the said harbour." The other granted £2,500, to be applied in *completing* the works for the improvement and preservation of the harbour. The 13-14 Vic. ch. 80, C., recited these Acts, and enacted that *the improvements made under them, and thereafter to be made in the harbour*, should be under the "control and management" of five commissioners, who were made a corporation, on which were conferred the powers vested in corporations by the Interpretation Act, 12 Vic. ch. 10, sec. 5, 24thly, and all such powers as might be necessary for carrying the Act into effect according to its true intent and meaning. The works and property constructed and acquired under the two former Acts for the purposes thereof, or that might be conveyed to them for such purposes by the city of Toronto, were vested in the new corporation. The only power given under the Interpretation Act which need be noticed, is to acquire and hold personal property or movables. The only duty *expressly* imposed on this corporation is to prepare plans and estimates for the improvement of the harbour. They had power to make by-laws regulating the use of the works and property vested in them, and for the government of all parties using the same, and of vessels and floats entering, &c., the harbour; and to impose tolls and fines, &c., &c., upon such vessels and goods landed or shipped; but there is no other provision which touches the question of a duty to remove such an obstruction as that complained of by the plaintiff.

Under this Act the harbour corporation erected a pier at the mouth of the harbour, as appears by the preamble to the statute of Canada, 25 Vic. ch. 26. It was proved at the trial that they had done some dredging alongside



the Church Street wharf, very near to where the sunken pier lies. This work was done at the request of parties interested in that wharf, but at the cost of the defendants, who had no property in or control over it.

The port or harbour of Toronto was described in the 13th section of the since repealed Act of 4 Wm. IV. ch. 23, as containing all that portion of the liberties of the city lying between the margin of the water on the north side of the marsh and bay east of the river Don and the southern limits of the said liberties, including the peninsula and island; these boundaries were declared to form the port of Toronto.

At the time that Act was passed (1834), there had been many wharves and storehouses erected by private individuals lying within the boundaries thus assigned to the harbour, and from the evidence given at the trial by Robert Maitland the sunken pier mentioned in the declaration as having been spoken of in 1850 or 1851 as an obstruction to the navigation, was probably then in use. It is further plain, according to that evidence, that if the lines of Church Street were produced southerly into the water the westernmost of them would intersect a small corner of an old wharf, which had been erected sufficiently long before 1851 to be spoken of as "old piers," part of which was above the water. The greatest part of those piers was built on what is now, and possibly was then, private property. A plan was used at the trial, a copy of which forms part of this appeal book. It purports to be a copy of one which is attached to letters patent from the Crown dated February 21, 1840, granting certain lands and lands covered with water to the city of Toronto. On this plan a lot, apparently a water lot, is laid down marked "A." It extends along the west side of Church Street, produced, about half way from the water's edge to a line marked on the plan as line "I, K," which is spoken of in the evidence as the windmill line, by which, as their southern boundary, a number of lots are limited, and the patent grants a very large part of them to the city. It

was not, as I understand, disputed at the trial that the obstruction complained of, by which the plaintiff's steam tug was injured, was included in the grant to the city. A deed was put in evidence, by which, in September, 1864, the above mentioned lot "A," bounded on the east by Church Street, or, to speak more accurately, by the west line of Church Street, produced, was conveyed by the city to one Dixon.

The Esplanade Acts, 16 Vic. ch. 219, and 20 Vic. ch. 80, must also be referred to. The first recites the letters patent of February 21, 1840, and authorizes the construction of an esplanade in front of the city, as shewn on an annexed plan. Power is given to the city corporation, on certain conditions, to convey to the owners of the water lots certain parcels of land designated on the plan; lot "A" is one of them. The latter Act, sec. 4, states that the conveyance of these parcels was intended as a compensation for the land which might be taken for the esplanade and for the expense of making so much thereof as should be made on the lands taken from the respective owners. Lot "A" is marked on this plan as belonging to a private owner—the wharf spoken of by Robert Maitland had been erected on it,—and a few feet of that wharf at the southeast corner thereof, which extend beyond the limits of lot "A," constitute the obstruction.

I have no doubt that the Legislature of Upper Canada did not intend by either of the two Acts 3 Wm. IV., ch. 31, and 7 Wm. IV., ch. 64, to vest the harbour in the commissioners. They had only authority to expend the moneys granted for the improvement and preservation of the harbour. The first enacting clause of the Act which erected the harbour corporation directed that the *improvements* made under these two Acts should, together with those thereafter to be made, be *under the control and management* of the new corporation. If they required to take any particular property for the improvement of the harbour, they could only acquire it through the medium of the city corporation. The improvement and preservation of the

harbour did not render it necessary that the whole space between the front of the city and the peninsula and island should be vested in them.

Now, when the wharf was erected on lot "A," probably more than forty years ago, it is not pretended that it was a public injury. So far as is shewn, it was erected on a water lot, and presumably in the exercise of a right of ownership. Independently of the case of *Regina v. Russell*, 6 B. & C. 566, which has been questioned in *Regina v. Ward*, 4 A. & E. 384, and in *Regina v. Betts*, 16 Q. B. 1022, and in which decision Lord Tenterden did not concur, I think the erection was lawful, to the extent of the limits of that lot. But the subsequent Crown grant of 1840, affirmed or rather recognised as effectual by the Legislature, puts an end to any enquiry as to the erection of the wharf being originally unlawful as an infringement of public rights; and it is as strongly opposed to the contention of the plaintiff that the harbour itself, and not merely the power and duty within the limits of that power of improving and preserving its existence, was vested in the commissioners. The power to pass by-laws of a particular character for defined purposes is not inconsistent with this, and the money they were authorized to expend was no doubt granted to preserve the harbour against the injurious effects of the winds and waves from without and from alluvial deposits within, from either or both of which causes dangers to the very existence of a harbour and shelter to vessels navigating Lake Ontario were apprehended. I think it would be a great strain of the language of the Act of incorporation of defendants to hold them liable in this case.

I concur, therefore, in the conclusion of the Court of Queen's Bench: 1st. Because the removal of an obstruction arising from a decayed wharf, which, for all that appears, was lawfully erected, for the most part, and only a small part of which was upon land covered by water, the property of the Crown, was not a duty imposed by the Act of incorporation upon the defendants.

2nd. If the obstruction had arisen from a natural cause,

*ex. gr.*, from a large rock lying in the water, it does not appear to be a duty imposed on the commissioners to remove it, or even to mark where it lay; and it can make no difference that it arose from the decay of an artificial erection, even unlawful, which was in existence many years before the commissioners were incorporated.

3rd. That the case is distinguishable from those referred to: *The Mersey Docks and Harbour Board Trustees v. Gibbs*, 2 R. 1 H. L. 93, and *Winch v. The Conservators of the Thames*, L. R. 7 C. P. 458, L. R. 9 C. P. 378. As to the first, because the property vested in the trustees was entirely of artificial construction and exclusively vested in them, whereas here it is a natural harbour open to all vessels navigating Lake Ontario. If the plaintiff's contention should prevail, it is difficult to see why the defendants should not be liable if a schooner was wrecked on the bar at the western entrance, or on a shoal within the limits of the harbour. And as to the second, the towing-path, for the non-repair of which the defendants were held liable, was erected by them. They had invited the public to use it, and had charged tolls for the user.

4th. Because, considering the patent from the Crown to the city of Toronto, and the plan attached thereto, it is very doubtful whether the defendants had any right, control, or duty over the *locus in quo* where the obstruction exists, as it seems questionable whether it is a part of the harbour, though being open water the plaintiff was not a trespasser in running his vessel there.

I think, therefore, the plaintiff was rightly nonsuited, and that the appeal should be dismissed with costs.

BURTON, J.—The Act 4 Wm. IV. ch. 23, sec. 13, defines the port or harbour of Toronto, as that portion of the liberties of the city lying between the margin of the water on the north side of the marsh and bay, east of the river Don, and the southern limits of the said liberties, including the peninsula.

Neither in the statute incorporating the commissioners, nor elsewhere, is any other definition to be found, so far as



I have been able to ascertain ; but it seems clear, and the case was argued before us on that hypothesis, that the locality where the injury occurred was part of the harbour, unless the grant to which I shall presently refer, and the legislation recognizing that grant, have the effect of confining its limits to the waters of the bay south of the windmill line, which forms in fact the southern boundary of the grant in question.

The grant referred to bears date the 21st February, 1840, and purports to convey to the city of Toronto, certain lots extending to the windmill line ; but such grant was necessarily subject to the general right of the public to use the water for the purposes of navigation without any restrictions, and could not in any way derogate from or interfere with that right, and the grantees could not, in respect of the ownership of the soil, do anything which would be productive of inconvenience to the public in the use of the water for such purposes.

Had no such grant been made, the erecting a wharf by a private person would have been a *purpresture*, an intrusion or encroachment on the Queen's soil, of which she could have ordered the removal, but a license from the Crown or a grant of the soil would be in subservience to the navigation, and in the event of such erection being made with the express license of the crown, the question would still remain whether it was an interference with the rights of the public in the use of the navigation. Such an erection, it is true, would not *ipso facto* be a nuisance, but whether a nuisance or not would be a question of fact to be determined by a jury upon evidence in each particular case. To warrant the exercise of these or any other powers inconsistent with that use of the water, would require an Act of Parliament ; and it was contended that the Esplanade Acts, 16 Vic. ch. 219, and 20 Vic. ch. 80, coupled with the grant, have the effect of restricting the jurisdiction of the commissioners to the waters south of the windmill line.

The first of these Acts was passed in 1853, and recites the grant I have already referred to, and authorizes the

construction of the esplanade in front of the city to the southern limit of the line marked O, on the plan referred to in the appeal books. The city are required, upon certain conditions being performed, to convey certain of the lots to the owners of water lots named, the lot on a portion of which the obstruction which caused the injury in this case stood being one of them; but there is nothing in the Act expressly authorizing the erecting of any works or buildings on them; whilst under the Esplanade Act, there was express authority to fill in to the line O. The recognition, however, in the Act of the right to grant these lots in compensation to the owners of the land taken for the esplanade, probably gives that power impliedly; but in the view I take of the liability of these defendants generally under the Act it is unnecessary to consider that question, or to offer any opinion as to what their obligations might be as to obstructions of this nature within the windmill line, if they were liable to remove a similar obstruction beyond it, because I am of opinion that there is no duty cast upon them, either by the statute or at common law, to remove an obstruction of this nature in the harbour, which was there before they were incorporated.

The case is distinguishable from many of those cited, inasmuch as the harbour is a natural not an artificial one; and the reasons which applied in *Parnaby v. The Lancashire Canal Co.*, 11 A. & E. 223, are inapplicable here. The question here is, whether there is anything in the Act of Parliament rendering it obligatory on these defendants to free the harbour from obstructions, or whether it is not discretionary with them to apply the funds at their command to that or any other purpose authorized by the Act, which in their judgment may seem most desirable.

All parties navigating the lakes are at liberty to enter the harbour, and before the incorporation of the defendants were exposed to this risk. The harbour itself is not vested in the defendants, although they are empowered to pass by-laws for its regulation and management, but the works alone, which under previous Acts of Parliament, had been

constructed, together with such other works as the defendants themselves may construct, or which the city may acquire and place under their control, are by the Act incorporating the defendants vested in them.

By the 3 Wm. IV. ch. 31, a grant was made, to be expended by certain commissioners, for the improvement and preservation of the harbour of York ; and they were empowered to superintend the construction of such works as by them might be thought necessary for such improvement and preservation ; and the Lieutenant-Governor was authorized to impose such tolls on the cargoes of vessels coming into the port and unladen within the same, and for wharfage on vessels lying under and protected by any works which might be constructed by the commissioners, as should be necessary to repay the grant. The 7 Wm. IV. ch. 64, grants a further sum on similar terms.

The tolls in each of these cases were confined to goods unladen or the vessels actually taking advantage of the shelter of the works.

The Act incorporating the defendants, 13-14 Vic. ch. 80, after referring to these two statutes, and reciting the necessity for making better provision for the improvement and management of the harbour, creates the defendants a corporation, and vests in them the works in the manner I have above referred to, but not the harbour, and empowers them to prepare plans and estimates for the improvement of the harbour, to make by-laws to regulate the use of the works and property vested in them or placed under their control, and for the government of all vessels coming into or using the harbour, and to impose tolls on such vessels and upon goods landed from or shipped on board the same, which tolls, they may, if they think fit, levy according to the use which may be made of such harbour and works aforesaid.

The 9th section provides that the proceeds of the tolls and revenues shall be applied : 1st. To the payment of expenses of collection and of managing the harbour and works, and keeping the same in an efficient state of re-

pair; and then to the payment of the interest on the sums borrowed, and of the principal as it should fall due.

The words here used, "in an efficient state of repair," would seem to be more applicable to their immediate antecedent "the works," which are vested in the commissioners, than to the harbour, of which they have the management and control; but assuming them to apply to both, can there be said to be an absolute duty cast upon them to remove this obstruction? Are they to disregard the obligation to pay the interest upon the sums borrowed, in order to remove an obstruction of this kind which existed years before their incorporation? Or is not the fair and proper construction of the statute, that the Legislature has reposed in them a discretion to apply the funds as they think fit; and, therefore, that they may direct what repairs shall be made to the harbour, what additions or repairs to the works, and the priority to be given to each, according as in their judgment one or other of these objects is more necessary or advantageous than the other. It may be a matter of imperative necessity to keep the entrance to the harbour open, or the approaches to the wharves free from an accumulation of mud or rubbish; and I apprehend it was the intention of the Legislature to leave these matters entirely to the judgment of the commissioners, and not that their discretion should be controlled by a jury.

In the absence, therefore, of any language rendering it obligatory upon the defendants to remove this obstruction, and looking at the language used as to the application of the funds, I am of opinion that the defendants are not liable.

Whilst stating this as my opinion, I do not think it necessary to rest the decision on that ground, as the question of liability is left to us with power to draw such inferences as a jury might have drawn. I fail to see any sufficient evidence to fix these defendants with knowledge of the dangerous state of the place at the time. It is said, it is true, that several vessels had struck, but none appear to have been seriously damaged; and it is not shewn that this



was brought to the notice of the defendants or the harbour master. A conversation is spoken of as having taken place in 1850 or 1851, but there is nothing to shew that the defendants were aware of the dangerous state of the harbour at that spot at or about the time of the accident, and the owner himself states that he passed over it a few days previously without injury.

I think, therefore, that the plaintiff's case fails, and that the judgment of the Court of Queen's Bench should be affirmed.

PATTERSON, J.—At the close of the trial it was agreed that the Court should decide the question of the defendants' liability, with power to draw inferences, and a verdict was entered for the plaintiff for £500, with leave to the defendant to move for a nonsuit on the whole case. The Court of Queen's Bench made a rule absolute for a nonsuit, and from that judgment the plaintiff appeals. The mode in which the case comes before us, upon the agreement of the parties, relieves us from the necessity of inquiring what questions are raised by the pleadings; an enquiry which, from the character of these pleadings, would have been somewhat embarrassing.

The plaintiff's complaint is, that the defendants negligently, and in violation of their duty, suffered a sunken crib or pier to remain in the harbour near one of the wharves, upon which the plaintiff's vessel struck and was injured. Upon the statutes affecting the question and upon the evidence given, we are to decide whether the plaintiff has a right of action, or whether the nonsuit should stand.

The power to draw inferences is not confined to the Court of Queen's Bench, but extends to this Court. I am aware that this Court, as formerly constituted, refused, in at least one instance, to draw inferences under a similar reservation, considering that the consent was only given to the exercise of the power by the Court in which the cause was pending; but that does not seem to be the view either of the Exchequer Chamber or the House of Lords.

This doctrine is stated in *Allen v. Smith*, 11 W. R. 440, and *Free Fishers of Whitstable v. Foreman*, L. R. 3 C. P., at p. 581, and in L. R. 4 H. L., at p. 280, per Lord Hatherly, and at p. 283 per Lord Chelmsford; and many cases may be cited as instances of its recognition, as, *e.g.*, *Moeller v. Young*, 5 E. & B. 7, 755; *Daniel v. Metropolitan R. W. Co.*, L. R. 3 C. P. 216, 591, S. C. L. R. 5 H. L. 45.

From the statutes and evidence, I gather the following facts:—The Act of 1834, 4 Wm. IV., ch. 23, which incorporated the city of Toronto and defined the limits of the city and liberties, defined also the limits of the harbour; section 13 declaring that all that portion of the liberties of the city lying between the margin of the water on the north side of the bay in front of the city, and the margin of the water of the north side of the marsh and bay east of the river Don and the southern limits of the said liberties (*i.e.*, 500 feet south of the peninsula), including the peninsula and island, should constitute and form *the port of Toronto*. In this statute the words *port* and *harbour* are used interchangeably, as *e.g.*, in section 2: “the island peninsula forming *the harbour*,” and in section 73, “the peninsula or island forming *the port of Toronto*.”

In earlier statutes, also, the port or harbour is mentioned; as in 7 Geo. IV., ch. 9, granting money to improve the light on Gibraltar point, which money was to be paid to the collector of the *port of York*, and which statute imposed a charge on vessels entering *the port of York*, or trading as packets to and from the *port of York*; and 3 Wm. IV., ch. 32, which granted £2,000 for the improvement and preservation of the *harbour of York*, and authorized tolls upon vessels entering the *port of York*.

The Act of 1834 was repealed by 12 Vic. ch. 80, and the limits of the city and liberties were re-declared by 12 Vic. ch. 81, but there does not appear to have been any new definition of the limits of the harbour.

The earlier statutes to which I have referred shew a recognition of the harbour before any legislative definition

of its limits; and even without their assistance there can be no difficulty in concluding that the place now in question always formed part of the harbour.

The Act of 1833, 3 Wm. IV. ch. 32, which granted £2,000 for the improvement and preservation of the harbour, named three commissioners to superintend the construction of such works as by them should be thought necessary, and power was given to the Lieutenant-Governor and Council to impose *rates or tolls* upon the *cargoes* of vessels coming into the port of York, *and unladen* within the same, and for *wharfage* on *vessels* lying under and protected by any works constructed by the commissioners, for the purpose of paying off the £2,000 and interest; and the Lieutenant-Governor was authorized to annul the regulations for levying *rates, tolls, and wharfage* when the money and interest should have been repaid.

In 1837, by 7 Wm. IV. ch. 74, a further sum of £2,500, was granted for the completion of the works for the improvement and preservation of the harbour; power was given to the Lieutenant-Governor to appoint three fit and discreet persons to superintend the expenditure of that money; and it was directed that the *rates* and *tolls* directed to be imposed by the former Act should be imposed before any part of the new grant should be advanced.

The Corporation of the Commissioners of the Harbour of Toronto was created by 13-14 Vic. ch. 80. Section 1 of that Act declares that the operation of the Acts of 1833 and 1837 shall cease, and the improvements made under those Acts, or thereafter to be made in the harbour, shall be under the control and management of the defendant's corporation.

Section 3 gives the corporation all the powers "necessary for carrying this Act into effect according to its true intent and meaning."

Section 4 declares that the works and property constructed and acquired by the commissioners appointed under the former Acts are thereby vested in the defendant's corporation, as also all such works and property

as should be constructed or purchased by them under that Act for the purposes thereof, or as should be assigned and conveyed to them for the said purposes by the common council of the city of Toronto acting for the municipal corporation thereof. And the common council, acting as aforesaid, were empowered to take any property which might be required by the defendants for the improvement of the harbour, in like manner and under like conditions as they were empowered to take property for the opening of any street in the city, the defendants to pay for such property out of the money which the Act authorized them to borrow; or the municipal council might place any property *under the control* of the defendants for any period, without absolutely conveying it to them.

Section 5 declared that it should be the duty of defendants to prepare plans and estimates for the improvement of the harbour, and that it should be lawful for them to acquire such property as should be requisite to enable them to execute the same, and to do all lawful things which might be necessary for the execution thereof.

Section 6 gave defendants power to make by-laws for regulating the use of the works and property vested in them or placed under their control, and for the government of all parties using the same, and of all vessels or floats coming into or using the harbour; and by such by-laws to impose tolls to be paid upon such vessels, and upon goods landed from or shipped on board the same, and upon such floats, which tolls they might, if they thought fit, levy according to the use which should be made of the harbour and works, and the period during which such use should continue in any case, with power to enforce payment of the tolls.

Section 7 gave power to employ servants.

Section 8 gave power to borrow £50,000 for defraying the expenses of improving the harbour and carrying the provisions of the Act into effect.

And section 9 enacted that the proceeds of the tolls and revenues to be received by defendants under the Act



should be applied, first, to the payment of all reasonable expenses of collecting the same and of managing the harbour and works and keeping the same in efficient repair; second, to pay interest and principal; third, to provide a sinking fund to pay off the loan.

It is proved that the defendants made three by-laws in 1855, of which No. 1 is directed to prevent persons obstructing the harbour by throwing in ballast or other things, or by sinking vessels, cribs, &c., and to the management of vessels using the harbour, and similar matters; but imposes no charges or tolls except upon vessels touching at or laid up at Queen's wharf, which wharf is well known to be one of the improvements made by the original commissioners, though it is not so proved in this case.

No. 2 is to regulate the collection of port dues, and it provides for the payment of "harbour dues as established by law," by all masters of vessels *arriving at the harbour of Toronto with cargo to be landed at the said harbour*. It provides that "vessels *loading cargo in the port of Toronto* shall leave a faithful report thereof at the harbour master's office on clearing," but says nothing of dues upon those vessels; and further provides that "all goods landed at the Queen's wharf shall pay wharfage as rated in the schedule annexed, over and above the harbour dues."

No. 3 relates only to duties of officers and printing the by-laws.

From this it appears that the defendants have not acted on the more extensive power of imposing tolls given by Section 6 of their Act of incorporation, but have confined the "harbour dues" to the same *tolls and wharfage* authorized by the Act of 1833.

It is further proved that in 1840 the Crown granted to the city of Toronto certain lots of land covered by the waters of the harbour and extending to a line called the windmill line, much further from the water's edge than the site of the obstruction now in question, and including a lot on the west side of the line of Church Street produced, called lot A; and the city conveyed that lot to a Mr. Dixon, who mortgaged it back to the city.

It also appears from the recital in the Act 18 Vic. ch. 145, that in 1840 the Crown had given the city a license of occupation of the peninsula and the marsh adjoining the peninsula and east of Ashbridge's Bay, though the peninsula was at that time included in the statutory limits of the harbour.

I believe these are all the facts to be gathered either from the statutes or the evidence, upon which the question of the defendants' duty can in any way turn.

The plaintiff's complaint is, that there is a sunken crib or pier forming the remains of an old wharf, and which is partly on lot A and partly on what would be Church Street, if Church Street were produced into the water; and that the plaintiff when backing his steam-tug to go alongside of a schooner which was lying at a wharf west of the line of Church Street, struck upon that part of the crib which was upon the line of Church Street, and his vessel was injured. The plaintiff did not know of the sunken crib, and had in fact gone safely over it a few days before; but other vessels had at different times struck upon it, though without sustaining damage. This crib had been in the same position and condition from before the incorporation of the defendants.

I would draw the inference from the evidence on that point that the defendants were aware of its existence, but not that they looked upon it as dangerous to vessels. Defendants had done nothing to the crib, although they had, at the request of persons interested in the wharves in its immediate neighbourhood, dredged near those wharves.

There is no evidence that any of the owners of those wharves, or any one else, ever called the attention of the defendants to this crib as being dangerous or as requiring removal, although the defendants were asked to dredge in the same vicinity.

One witness does speak of having talked in 1850 or 1851 with the harbour master then in office, of these old piers as an obstruction to navigation, but he does not say that they were considered dangerous, and the conversation is

not stated to have been after the defendants were incorporated, or to have reached the defendants in any way.

The Court of Queen's Bench has held that, because the crib or pier in question was north of the windmill line and on private property, it was "not within the limits of the harbour as vested in the defendants, and that the defendants had not the right or power against the will of the owners of the soil to remove the same," and that therefore the defendants are not liable in this action.

I am not prepared to dissent from this conclusion, although I have not been able to satisfy my own mind that if the defendants are charged with the duty of cleansing the harbour and of removing obstructions such as the one now in question, any distinction can be sustained between different parts of the navigable waters of the harbour; whether those waters flow over land which is the property of the Crown, or land which has been granted to the municipal corporation of Toronto or to individuals; particularly as the wharves are nearly all upon private property, and the jurisdiction of the defendants with respect to imposing tolls on vessels landing cargoes, &c., apparently permits the imposition of tolls in respect of cargoes landed at those wharves.

But, in my opinion, no duty such as that now charged attaches to the defendants with respect to any part of the harbour, at all events to the extent necessary to entitle a ship owner to an action like the present; and upon this ground I think the defendants are entitled to our judgment.

In the case of an artificial dock or canal, and even where the soil in its natural state may form part of the accommodation provided for the public, as in the instance of the towing path in *Winch v. The Conservators of the Thames*, L. R. 7 C. P. 458 S. C. 9 C. P. 378, a contract is created. On the one side the public are invited to use the works on payment of a price, usually called a toll, and on the other hand the obligation arises to supply the accommodation which is paid for, and to take reasonable care that the customer shall not be exposed to danger in using it.

As expressed by Lord Tenterden in *The Kingston-upon-Hull Dock Co. v. La Marche*, 8 B. & C. 42, at p. 52, it is "a bargain made between a company of adventurers and the public, and, as in many similar cases, the terms of the bargain are contained in the Act."

The same learned Judge uses similar language also in *Stourbridge Canal Co. v. Wheeley*, 2 B. & Ad. 792. Many cases have been decided upon this principle, of which I may cite as examples *Parnaby v. Lancaster Canal Co.*, 11 A. & E. 223; *Mersey Docks Co. v. Gibbs*, L. R. 1 H. L. 93; *Winch v. Conservators of the Thames*, L. R. 7 C. P. 458, S. C. L. R. 9 C. P. 378; *Sweeny v. President, &c., of Port Burwell Harbour*, 17 C. P. 574, S. C. 19 C. P. 376; *Berryman v. President, &c., of Port Burwell Harbour*, 24 U. C. R. 34.

The Toronto harbour is a natural harbour. The public navigate its waters, not by the permission or at the invitation of the defendants, but as of right. The contract does not exist, as in the case of an artificial work; and the duty charged, if it exists at all, must be found in some direct statutory enactment, or must arise as the legal consequence of some statutory privilege conferred, or obligation imposed.

As far as the obstruction in question is concerned, the harbour is in the same state as when the defendants were incorporated; and it is only such an obstruction as a rock or a sandbank would be. It does not, as far as I can gather, prevent access to any part of the harbour or to any wharf, but merely requires care on the part of those sailing in its vicinity.

Even if the harbour were vested in the defendants, and they had imposed tolls on all vessels using it, as seems to have been the fact in *The Parrett Navigation Co. v. Robins*, 10 M. & W. 593, the liability would not follow as a matter of course. But the harbour is not vested in the defendants; nothing is vested in them but the property and works constructed or acquired by purchase, or from the common council.



The clause (No. 2) which places the *improvements* under the control of the defendants, stops short of even putting the *harbour* under their control. The only clauses which, even in appearance, point towards the asserted duty are the sixth—which gives power to make by-laws for the government of all parties using the harbour, and of all vessels coming into or using the harbour; and to impose tolls on all such vessels, and upon goods landed from or shipped on board the same; adjusting the tolls, if the defendants think fit, according to the use made of the harbour and works, and the period during which such use shall continue—and that part of section 9 which directs a part of the revenue to be applied in “managing the harbour and works, and keeping the same in efficient repair.”

I have seen no authority for holding that the mere *power to impose* tolls creates any duty towards persons using a natural harbour; and, while I do not consider that, even if tolls were imposed, a duty to remove obstructions like the crib now in question would necessarily arise, I find from the by-laws in evidence that no tolls are in fact imposed which this plaintiff has to pay in respect of his tug. The only tolls are for the use of the Queen’s wharf, and in respect of cargoes landed.

The obligation to apply part of the revenue in “managing the harbour and works and keeping the same in efficient repair,” falls far short of creating the duty upon which the plaintiff relies.

I am strongly of opinion that the proper construction of this clause, having regard to the general scope and provisions of the statute, is to read “efficient repair” as referring only to “the works” and not to “the harbour.”

But, in order to maintain his case on this clause, the plaintiff has to establish that the defendants were bound not only to spend the money in repairs, but to remove this particular obstruction.

There being no express enactment that all parts of the navigable water, or all parts of the harbour which ever were navigable, shall be restored to or maintained in a

navigable state, but only that certain money shall be spent in repairs, it would have to be shown that there was money which the defendants were bound to devote to this very purpose.

If there is such a duty as the plaintiff asserts, another result would follow. Its neglect might or might not form the ground of an action for damages, but there is no doubt that by a proper process the defendants could be compelled to perform the duty, as is pointed out by Lord Hale in his treatise *De Jure Maris*, ch. 6, where he discusses nuisances and the means whereby they may be prevented or remedied.

It would be impossible to hold that, in view of the provisions of the statute—the power to borrow a limited sum for improvements apparently in contemplation when the Act was passed, and no further power to borrow money or to procure any revenue except from tolls which of necessity must be reasonable in amount—the defendants could be compelled to undertake whatever might appear necessary for the repair of the harbour (as, *e. g.*, closing up the gap which the waters of the Lake have broken through the peninsula), or that they could be compelled to do anything beyond expending on repairs the money at their disposal.

If there is no duty to remove the obstruction, I do not see where any duty arises to mark it by a buoy or beacon. That duty when it is spoken of, as in *Parnaby v. Lancaster Canal Co.*, 11 A. & E. 223, is not treated as taking the place of the duty to repair, but as a mode by which a person who has the right to be protected from danger in the use of a canal or harbour may be warned of the danger and enabled to avoid it. It is not a duty which can be charged where the duty to repair does not exist.

I shall refer to some cases which seem to me to bear out the views I have stated.

*Metcalfe v. Hetherington*, 11 Ex. 257, was an action against the secretary of trustees for improving a natural harbour. The first and second counts were held bad on the ground that the trustees were not liable for the negli-

gence of the harbour-master. That decision has now lost its authority, as it is settled that public officers are not, by reason of their official position, freed from responsibility for the negligence of themselves or their servants.

This was the decision in the *Mersey Docks and Harbour Board Trustees v. Gibbs*, L. R. 1 H. L. 95, and the ground on which several other cases have been decided, including the recent one of *Campbell v. Hornby*, 7 Ir. C. L. 540, in which the commissioners of Kingston harbour were held responsible for damage to a vessel caused by collision with a stone which had fallen from its place in one of the piers.

But there was a third count in *Metcalfe v. Hetherington*, 11 Ex. 257, charging negligence in allowing rubbish to accumulate and remain in the harbour, by which the plaintiff's vessel was delayed and injured. The decision on that count has not been questioned, as far as I am aware.

The judgment of the Court was given by Parke, B., who says, at p. 272, 273: "In the next place, we are clearly of opinion, that if the trustees had received funds sufficient for that purpose from the different sources mentioned in the Act, no action would lie against them for not cleansing the port, or suffering rubbish to accumulate there; for the Legislature reposes in them an absolute discretion (with certain exceptions) to dispose of the funds arising from tolls on shipping in maintaining the harbour. \* \* If they have a surplus in their hands, after paying interest on the loans, may they not, although the harbour wants cleansing, apply that surplus to the repairs of the piers, to purchase windlasses, to provide buoys, to make another jetty, to deepen the mouth of the harbour, if they think these objects are more pressing and of more advantage to the harbour than keeping of the bottom of it clean; and can this discretionary power, which is confided to them as trustworthy persons by Parliament, be subject to the control of the opinion of a common jury, who may overrule their decisions in an action against them, if they think they have acted with wrong judgment, and render them

liable to pay costs? We think such a proposition perfectly untenable."

In *Hartnall v. The Ryde Commissioners*, 4 B. & S. 361, the defendants were held liable for a highway being out of repair, on the ground that there was an express statutory duty to repair imposed on them.

Blackburn, J., says, at p. 367: "*Metcalfe v. Hetherington*, 11 Ex. 257, is not in point. There the declaration was against trustees of a harbour appointed under a local Act of Parliament for negligence in keeping the harbour, whereby the plaintiff's ship, in respect of which the defendants received harbour dues, was injured; but it did not shew that the trustees were under any obligation to clear out the harbour; and upon that the decision of the Court was that the declaration was bad; and it was said that if such an obligation was shewn, inasmuch as they had under the Act a discretion as to the application of the funds, in order to make a good declaration it should have been alleged further that they had funds in their hands which they were bound to apply in clearing out the harbour. In the Towns Improvement Clauses Act, 1847, section 49, the Legislature have used clear language to express what was not expressed in the local Act in *Metcalfe v. Hetherington*, 11 Ex. 257, viz., that the Commissioners shall repair the highways and be liable to an indictment for neglecting to repair them."

*Wilson v. The Mayor and Corporation of Halifax*, L. R. 3 Ex. 114, was an action under Lord Campbell's Act to recover damages against defendants for having permitted a public footpath to remain without a fence, whereby the deceased fell into a goit by the side of the path and was drowned.

Kelly, C. B., says, at p. 118: "The 68th section vests all the streets, being highways, in the local board, who are in this case the defendants, and enacts that they *shall* from time to time cause the same to be repaired, and that they *may* from time to time cause the soil of the streets to be raised, &c., and *place and keep in repair fences and posts*



for the safety of foot-passengers. The argument for the plaintiff was, that this section made it obligatory upon the defendants to place fences and posts along the footways, and an ingenious argument was presented to us, that part of this section may be read as a parenthesis. But we think, whether these words may be so read or not, that upon the true construction of the whole enactment, a discretion was necessarily vested in the board as to what fences and posts should be placed or erected in ancient footpaths where none had ever existed before. The supposed absolute duty of the defendants upon which the second count is framed therefore does not exist, and this cause of action fails."

*Parsons v. The Vestry of St. Matthew, Bethnal Green*, L. R. 3 C. P. 56, was an action for the loss of a horse, caused by want of repair in a highway, and it was contended that a statute cast upon the defendants the duty of repairing the highways and made them liable to the action. Defendants were held not liable, and *Hartnall v. Ryde Commissioners* was distinguished, as it was also in the judgment in *Gibson v. Mayor, &c., of Preston*, L. R. 5 Q. B. 218, by the circumstance that the statute under which it was decided expressly imposed the duty of repairing the roads.

In *Winch v. The Conservators of the Thames*, L. R. 9 C. P. 378, in the Exchequer Chamber, Cleasby, B., differed from the rest of the Court, and held that the defendants were not liable.

Bramwell, B., giving the judgment of the majority of the Court says, at p. 388: "We think that *Parnaby v. Lancaster Canal Co.*, 11 A. & E. 223, and *Mersey Docks and Harbour Board Trustees v. Gibbs*, L. R. 1 H. L. 93, establish that such a duty is by common law cast upon those who invite persons to use a towing path like this, and receive pay for the use of it. It was argued that those cases were not applicable, because the part of the towing-path where the accident happened was on the natural soil only worn into a track made by the horses' feet leading from a bridge over one ditch to a bridge over another, and it was argued that the common

law only imposed this duty on those who maintained artificial works, such as canals, or docks, or bridges. We wish to guard against being supposed to decide that in every case where a license is given for money to go over land in its natural state this obligation exists. But we think that in this case, where persons pay one toll for the use of one entire towing-path, parts of which are artificial and parts not, there can be no distinction made as to the duty of those who maintain the path to take reasonable care of the artificial and the natural parts, or at least to warn those who use them of the defects in them."

In *Jenkins v. Harvey*, 1 Cr. M. & R. 877, Parke, B. says : at p. 893, "The King may grant to a subject the franchise of creating a port, and may confer upon the person who thus dedicates his land to the public, and incurs the obligation of repairing the port, a compensation from those who use the port, in the dues paid in respect of the various commodities imported."

In *Foreman v. The Free Fishers of Whitstable*, L. R. 4 H. L. 266, which was an action to recover anchorage dues, Lord Chelmsford says, at p. 285: "It was also argued for the appellant that toll could not be demandable for the use of the port of Whitstable as a place of anchorage, because it was not artificially formed, but was a natural roadstead, and therefore no obligation was laid upon the owner of the port to repair it and keep it accessible, so as to form a consideration for the anchorage toll. This is only another form of the argument that an anchorage toll can only be due in respect of the specific benefit to vessels which the name imports. But that the repair of a port is not the necessary consideration for an anchorage toll appears from what has been already cited from Lord Hale, that the franchise of a port may be in one person and the ownership of the soil within the limits of the port in another."

I agree that the judgment should be affirmed.

*Appeal dismissed.*

SAMUEL TOMS AND ELIZABETH TOMS, his wife, Plaintiffs  
in the Court below, *Respondents*, v. THE CORPORATION  
OF THE TOWNSHIP OF WHITBY, Defendants in the Court  
below, *Appellants*.

*Municipal corporations—Repair of bridge.*

The decision in this case, reported in 35 U. C. R. 195, affirmed; and the defendants held liable for the want of a railing and protection along the sides of an embankment leading to a bridge, in consequence of which the plaintiffs' horse, being frightened, backed the waggon over it.

APPEAL from the Court of Queen's Bench discharging a rule *nisi* to enter a nonsuit or arrest the judgment, reported in 35 U. C. R. 195.

The action was for an alleged injury to the female plaintiff by backing over the side of a bridge while driving across it, it being alleged that the defendants had neglected to guard or fence the bridge.

The grounds of appeal and the authorities supporting the same were:—

1. There is no duty on a municipal corporation to fence the sides of a highway as against pits, precipices, or deep waters: *Wilson v. The Mayor, &c., of Halifax*, L. R. 3 Ex. 114; *Sykes v. The Town of Pawlet*, 5 Am. R. 295; and also *Saunders on Negligence*, 95. The 29–30 Vic., ch. 51, sec. 333, sub-sec. 4, referred to in the decision of Mr. Justice Wilson as authority to the contrary, enables a municipal corporation to make regulations as to pits, precipices, and deep waters, and other places dangerous to travellers, but creates no duty: *In re Trustees of the Weston Grammar School & The Corporation of the United Counties of York and Peel*, 13 C. P. 423; *In re Kinnear & The Corporation of the County of Haldimand*, 30 U. C. R. 398; *Bell v. Crane*, L. R. 8 Q. B. 481. The facts stated in the declaration raise no such duty, so the rule should have been made absolute to arrest the judgment: *Seymour v. Maddox*, 16 Q. B. 326; see also *Davis v. Black*, 1 Q. B. 900; *Boorman et al. v.*

*Brown*, 3 Q. B. 511; or to enter a nonsuit: *Crafter v. The Metropolitan R. W. Co.*, L. R. 1 C. P. 300; see also *Sparhawk v. The City of Salem*, 1 Allen 30; *Collins v. The Inhabitants of Dorchester*, 6 Cush. 396.

2. Assuming, however, that it was the duty of the municipal corporation to fence as against the deep water, it was shewn that the duty was performed, and no liability arises because the fence or railing constructed, owing to defective workmanship or some other cause of which the corporation had not notice, was insufficient to resist the force of an affrighted horse backing against it without control or restraint: *Sykes v. The Town of Pawlet*, 5 Am. R. 295; *Bateman v. The City of Hamilton*, 33 U. C. R. 244; *Dillon's Municipal Corporations*, 2nd ed., sections 789, 790, and notes thereto.

3. The defect, if any, in the fence or railing was not such as to subject the corporation to a criminal prosecution for nuisance: *Rex v. Tindall*, 6 A. & E. 143; *Regina v. Betts*, 16 Q. B. 1022; *Regina v. The Electric Telegraph Co. Limited*, 9 Cox 174; *Howard v. Inhabitants of North Bridgewater*, 16 Pick. 189; and this being so, they are not liable to pay damages: *Merrill v. The Inhabitants of Hampden*, 26 Maine 234; *Ringland v. The Corporation of the City of Toronto*, 23 C. P. 93

4. The negligence, if any, of the municipal corporation was not shewn to be the sole and proximate cause of the accident. On the contrary, it appears that the same was caused partly or wholly by the horse becoming unmanageable and beyond the control of the plaintiff's wife and child, in which case no action lies against the municipal corporation: *Adams v. The Inhabitants of Carlisle*, 21 Pick. 146; *Marble v. The City of Worcester*, 4 Gray 395; *Davis v. Inhabitants of Dudley*, 4 Allen 557; *Titus v. Northbridge*, 97 Mass. 258; *Horton v. The City of Taunton*, 97 Mass. 266, note; *Moore v. Inhabitants of Abbot*, 32 Maine 46; *Moulton v. The Inhabitants of Sanford*, 51 Maine 127; *Illinois Central R. W. Co. v. Buckner*, 28 Ill.



299; *Soule v. Grand Trunk R. W. Co.*, 21 C. P. 308; *Flower v. Adam*, 2 Taunt. 314.

5. There was such contributory negligence on the part of the plaintiff's wife and child, as on the facts proved and not contradicted prevents a recovery against the corporation: *Butterfield v. Forrester*, 11 East 60; *Flower v. Adam*, 2 Taunt. 314; *Soule v. Grand Trunk R. W. Co.*, 21 C. P. 308; *Bradley v. Brown*, 32 U. C. R. 465; *Smith v. Smith*, 2 Pick. 621; *Cobb v. Inhabitants of Standish*, 14 Maine 198.

The reasons against the appeal were:—

1. As to the first reason of appeal, the respondents contend that it is the duty of a municipal corporation to keep the highway in repair, 29–30 Vic., ch. 51, sec. 339. And that the section 333, sub-section 4, of the same Act, also gives them power to do what was necessary. That this duty is not fulfilled unless the highway is made reasonably safe for travel. And that if the corporation have the power to remedy an existing defect, and its continuance leaves the place dangerous, they are liable for negligence: *Ohrby v. The Ryde Commissioners*, 5 B. & S. 743. “In general terms non-repair may be said to be any defect in a highway which renders it unsafe for ordinary travel”: *Harrison's Mun. Man.*, 3rd ed., 401; see also *Caswell v. St. Mary's Plank Road Company*, 28 U. C. R. 247. “Should a railing or other barrier be necessary to the safety of the passengers, it may be held to be the duty of the corporation to provide for the same”: *Harrison's Mun. Man.* 3rd ed. 402. It is sufficiently stated in the declaration that such railing was necessary, and therefore the judgment should not be arrested. There had been a railing previously, and the omitting to restore a railing once admitted to be necessary is a want of repair, and sufficient to make the appellants liable for all injury resulting from the absence of such railing: *Ohrby v. The Ryde Commissioners*, 5 B. & S. 743. “It must be a question of fact altogether for a jury to say whether the place alleged to be out of repair is dangerous, and if so, from what cause”: *Caswell v. St. Mary's, &c., Plank Road Company*, 28 U. C. R. 247, 254; and see

*Harrison's Mun. Man.*, 3rd ed. 401. There was sufficient evidence to warrant the finding of the jury, and therefore the verdict should not be disturbed.

2. As to the second point taken in the reasons for appeal, the question whether the fence or railing was sufficient, and if not, whether the corporation had knowledge of it, was left to the jury, and there was abundant evidence to sustain their finding: *Longmore v. Great Western R. W. Co.*, 19 C. B. N. S. 183; *Tuff v. Warman*, 2 C. B. N. S. 740.

3. As to the third reason for appeal, it is contended that the cases cited by the appellants only shew, that when the evil or nuisance complained of exists in so small a degree as scarcely to amount to a wrong, then the corporation would not be liable to an indictment, but that rule cannot apply to a case like the present, where the evidence shews that it was known and considered by many to be a dangerous place, and was in fact dangerous.

4. As to the fourth ground of appeal, that the accident was caused partly or wholly by the horse becoming unmanageable, it is submitted that the fact that the horse became unmanageable is not due to some extraneous cause, but was one of the consequences of the dangerous state of the road, and it is contended that when the road is in such a state as to cause fright to a horse attempting to pass it, the road is in a dangerous state, and it was the duty of the defendants to amend it, and that the dangerous state of the road, so causing fright, is a proximate cause of the injury resulting from the behaviour of the horse while under the influence of the fright so caused: *Hill v. New River Company*, 9 B. & S. 303.

5. As to the fifth ground of appeal, the respondents contend that no contributory negligence was proved; there was nothing wrong or negligent in allowing his wife and child to drive the horse, which was not known to be vicious or unfit to be driven, and when the horse became frightened it is not every error in judgment which can be said to be

an act of contributory negligence—at any rate the question was left to the jury, and the finding was for the plaintiff.

The respondents further contend that the corporation having opened the said road and assumed the control and invited the public to use it, are in the condition of an owner of private property if he invites the public to pass over premises while in a dangerous condition.

June 15th and 19th, 1875 (*a*). The appeal was argued by *Harrison*, Q.C., for the appellants, and by *M. C. Cameron*, Q.C., for the respondents. The arguments and cases cited sufficiently appear from the foregoing reasons for and against the appeal, and from the argument in the Queen's Bench, reported in 35 U. C. R. 200, 201, 202.

September 15, 1875. DRAPER, C. J. of Appeal (*a*).—I am of opinion that, under our Municipal Act of 1866, which was the law in force when the accident occurred which was the subject of this action, the defendants were subject to the obligation of fencing, guarding, and keeping in a reasonable state of repair that part of the highway where the plaintiff Elizabeth Toms was so severely injured, as has been proved.

I am also of opinion that the defendants had, contrary to their duty in that behalf, neglected to maintain the *locus in quo* in a proper state and condition so as to protect travellers who had occasion to use this highway from danger of a serious character.

The evidence, in my judgment, establishes that, owing to this negligence, the plaintiff Elizabeth was, while driving a horse and waggon, thrown out of the waggon and cast over a steep embankment, which the defendants had neglected to keep properly fenced and guarded. And although it may be true, as stated in the third plea to the first count, that the defendants had at one time placed proper guards and railings along the side of the embankment, yet the plea

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(*a*) Present.—DRAPER, C. J. of Appeal; STRONG, J.; BURTON, J., and PATTERSON, J.

does not fully meet the declaration, because, however sufficient such rails may have been when first put up, they were allowed to become ruinous and out of repair, and consequently wholly insufficient. The defendants' duty was not only to erect but to maintain.

The finding of the jury upon the question properly submitted to them, whether there was any want of care and attention in driving the horse, so far concludes the defendants; and I also think that finding ought to be regarded as determining that the state of the road and the want of a proper fence were the proximate causes of the accident.

I concur in the opinion of the Court below, that the verdict on the first count should be reduced to \$1,000, and on the second count to \$250, and unless the plaintiffs consent to this reduction, that the rule for a new trial should be made absolute in the Court below, on payment of costs, otherwise that it should be discharged.

I cannot refrain from expressing my sense of the great labour and research of my brother Wilson, so fully displayed in the opinion delivered by him in the Court below; but resting my conclusion as to the duty of the defendants upon the statute, and as to the facts upon the finding of the jury, which is amply sustained by the evidence, I think it unnecessary to add more than the expression of my opinion, that in upholding the right of the plaintiffs to recover upon the facts proved I am not giving any support to the doctrine which my brother Morrison desires to guard himself from encouraging. I am of opinion that the facts proved warrant the conclusion that the accident arose from the negligence of the defendants in permitting the railing which had been erected along the line of the embankment to become useless for want of necessary repairs: that the horse backing was a casualty not attributable to want of reasonable care and skill in driving, and would not have resulted in any injurious result if the embankment had been properly fenced.

I think that the appeal should be dismissed with costs.



STRONG, J., concurred in dismissing the appeal with costs, on the grounds contained in the judgment of Paterson, J.

BURTON, J.—I am also of opinion that the judgment should be affirmed. The question really turns upon the construction to be placed upon Sec. 339 of the Municipal Act of 1866: "Every such (public) road, street, bridge, and highway shall be kept in repair, by the corporation, and the default of the corporation so to keep in repair, shall be a misdemeanor punishable by fine, \* \* \* and the corporation shall be further civilly responsible for all damages sustained by any person by reason of such default."

Mr. Harrison contends that the obligation created by this section is merely to keep the road-bed itself in repair, that the erection of a fence was, at most, a self-imposed duty—not one cast upon them by law—and that no indictment would lie for the omission to erect it.

I do not think we can place so narrow a construction upon the words of the Act; but that where a fence or barrier is necessary for the safety of travellers at places on the highway, where some steep bank or other dangerous place exists, so near to it as to expose them to injury through some of the mischances incident to such use of the road, it is incumbent upon the municipality to make the road reasonably safe for travel by the erection of such fences.

It may be difficult to define the extent of this obligation; it must depend upon the circumstances of the particular case, the locality, and the danger to be guarded against; but it would be an essential element in any case in which a railing was required, that there should be some dangerous precipice or place beyond it upon which a traveller, exercising ordinary care, might come to harm if not warned or detained by the barrier so erected for his protection; and it must be a question for the jury to say on the evidence whether such a protection was necessary to make the highway safe at the place of the accident.

That question, in my opinion, was properly submitted to the jury in this case, and there being sufficient evidence to warrant the finding, it cannot be disturbed on that ground.

But it is said that, owing to the want of experience and care of the party who was driving the horse, it had become unmanageable. That this was owing to no defect in the road itself, but that, whilst beyond the control or management of the driver, the accident occurred, and that even assuming a liability on the part of the defendants to erect the fence, there was no obligation on them to keep the highway safe for runaway horses.

The jury have found that whoever was driving was a fit and competent driver, and did not contribute to the injury; and assuming for the present, to the fullest extent, that the municipality are only bound to keep the road in such a state as to render it safe for travel according to the ordinary usages of travel, and that if it had been shewn that the horse had, from no fault or negligence of these defendants, taken fright, and become unmanageable, and whilst so beyond the control of the driver had come upon a defect in the highway, by which an injury had been occasioned, that the municipality would not have been liable; that is not the present case. A horse is not to be considered uncontrollable in this sense, if he merely shies or starts, or is momentarily not controlled by his driver. As I read the evidence, that was the case here; the horse backed, and in a moment the hind wheels were over the bank, and the female plaintiff and her son thrown out. It may fairly be assumed that the injury would not have happened had the road, at this place, been properly protected. I see no reason, therefore, for interfering with the verdict of the jury; but the rule is also to arrest the judgment, on the ground that there is no such duty cast on the defendants as in the first and second counts of the declaration alleged.

I understand the objection to the declaration to be that the duty to fence is charged as an absolute duty, and that there is no allegation of the place being dangerous, or any

facts alleged to shew the necessity of erecting a fence at the particular spot.

It is not necessary to offer any opinion as to the sufficiency or insufficiency of the declaration upon demurrer, but the objection now arises after verdict, and it must be assumed that the Judge properly directed the jury as to what it was necessary for them to find in order to their returning a verdict in favour of the plaintiffs.

The authorities on the point are all collected in Mr. Justice Williams's valuable edition of *Saunders*, in the note to *Stennel v. Hogg*, 1 *Wms. Saund.*, ed. 1871, p. 260, and the rule laid down at p. 261, viz., "That where there is any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection on demurrer; yet, if the issue joined be such as necessarily required on the trial proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the Judge would direct the jury to give, or the jury would have given the verdict, such defect, imperfection, or omission, is cured by the verdict at common law."

I think, therefore, upon this record, the plaintiffs are entitled to judgment, and that the decision of the Queen's Bench should be affirmed.

PATTERSON, J.—The first count charges that a highway was vested in the defendants as a public highway, a portion of which was composed of a bridge across a stream, and of embankments or approaches to the bridge, constructed by the defendants to be used as a part of the highway: that it was defendants' duty to have used due and proper care and skill in the construction of the bridge and embankment, and to have placed proper guards or railing along the sides thereof, so as to render the highway safe and convenient to travel thereon; yet the defendants constructed the bridge and the embankment, the approach thereto, with so little care, and neglected to guard or fence the side of the embankment, that by reason thereof, and for want of such

railing or guard, a buggy of the plaintiff Samuel, drawn by a horse of Samuel, and driven by the plaintiff Elizabeth, was backed by the horse over the embankment, and Elizabeth was injured.

The second count is similar, claiming for expense and loss to the husband.

The defendants plead not guilty ; and pleas denying that the highway was vested in them as a public highway, and asserting that they used proper care and skill in the construction of the bridge and embankment, and placed proper guards and railings along the sides thereof.

Issue is taken by the plaintiffs upon these pleas.

A verdict was found for the plaintiffs.

The defendants obtained a rule *nisi* for a nonsuit, upon leave reserved at the trial, or for a new trial, and also in arrest of judgment.

This rule was discharged by the Court of Queen's Bench (except as far as it related to damages), and from that judgment the defendants appeal.

I see no ground for arresting the judgment. The charge is, that the defendants did not use proper care in the construction of a bridge and an embankment, which they constructed as part of a public highway which was vested in them, and that they neglected to place a fence or guard on the side of the embankment, and by reason thereof, (that is, of such negligent construction), and for want of such railing or guard, the horse backed the buggy over the embankment.

On this part of the rule it is unnecessary to consider whether it can be said that there is a duty upon municipal corporations to place a railing or guard along the edge of a bridge or embankment. The statutory duty is to keep the highway in repair. The allegation that the corporation constructed upon the highway an embankment in so negligent a manner that by reason of this negligence an injury happened to a traveller on the highway, is a sufficient charge of breach of the duty to keep in repair.

Whether it can be said that there was a positive duty to



fence the embankment, or whether the reference to fencing may be treated merely as a statement that the defendants neglected a precaution which might have averted the danger to which travellers were exposed from the want of repair of the highway, and so as an unnecessary statement in the declaration, is, after verdict, immaterial.

Then as to the other part of the rule. The facts relied upon by the plaintiffs were that Mrs. Toms and a young son of hers were driving over the bridge, when the horse, which was a quiet horse, shied at something, probably some new planks in the bridge, and backed to the side of the embankment where there was no protection to prevent the wheels going over the embankment; and the hind wheels did go over, and Mrs. Toms and the boy were thrown out. There was a railing on the side of the bridge, which had once extended along the embankment to the place, or very near the place where the wheels went over; but, from the washing away of the embankment by the stream, several feet of earth apparently having been washed away, and from the rotting away of the railing or its supports, there was nothing to prevent the wheels going over.

It was admitted that the road was a public highway.

Three questions were left to the jury: 1. Was the road in a sufficiently safe state for persons who drive along the road?

2. Was Mrs. Toms or were she and her boy together reasonably fit and competent to drive this horse along the road?

3. Was Mrs. Toms, or was her boy, or the two together, guilty of negligence in managing the horse at the time of the accident, so that their mismanagement of the horse was the occasion, the proximate cause, of the damage that was done, so that but for such negligence the injury would not have happened?

The effect of the verdict is to answer the first and third questions in the negative, and the second in the affirmative.

The only objections to the charge of the learned Judge were the same objections taken at the close of the plaintiffs'

case as grounds for nonsuit, and those objections were repeated in the rule *nisi*, and have been argued before us. There are nine objections stated, which amount in substance to the following, viz., that the duty of defendants was only to keep the highway in such repair as to be safe for ordinary travel, which did not include a legal obligation to fence this embankment: that the duty of the defendants was shewn to have been performed, and they were not shewn to be guilty of actionable negligence: that the proximate cause of the accident was the fright of the horse, and not the default of the defendants; and that there was contributory negligence.

The jury found all the questions in favour of the plaintiff, upon a charge which certainly left them at liberty to treat the question of the fence or guard as one of the criteria in deciding whether the road was safe.

I understand the duty of the corporation, the neglect of which subjects them to an action like the present, to depend wholly upon the statutory enactment, which at the time of this accident was 29-30 Vic., ch. 51, sec. 339, and which is now repeated in 36 Vic., ch. 48, sec. 409, O.

The enactment is that "Every such road, street, bridge, and highway shall be *kept in repair* by the corporation, and the default of the corporation so to *keep in repair*, shall be a misdemeanor \* \* and the corporation shall be further civilly responsible for all damages sustained by any person by reason of such default."

In this case there were grounds for finding that the road was out of repair, quite apart from the want of the fence; as the road, which had never been very wide, had been washed away, until it was actually narrower than the bridge. But as the question of the fence was left to the jury, and we cannot tell on what facts the verdict is based, we have really to decide the general question, whether, in the case of a road constructed upon an embankment or skirting a declivity, with the roadway of proper width and in good order, but where, without a guard, there is danger to vehicles, in the ordinary use of the road, of run-

ning over the side in a dark night, or by reason of the sudden fright and shying of a horse, or the derangement of the harness, or displacement of some bolt or fastening, the existence or absence of a fence or guard can be made one of the criteria of the road being in repair.

The question is not whether the corporation is bound to fence every such place; but whether, having regard to all other circumstances, it can properly be said, in any case, that the neglect to fence constitutes a "default to keep in repair" within the meaning of the statute.

If it does so, then there remain the questions whether the accident can be said, upon the evidence, to have occurred in the ordinary use of the road by the plaintiff's carriage, and to have been caused by the want of repair. These are the only questions which the finding of the jury leaves open to us.

The New England States have statutory enactments similar to ours. They are collected by Mr. Dillon in a note to sec. 786 of his very useful work on Municipal Corporations, and the decisions upon those statutes afford us valuable assistance in construing the section now in question.

In those States it seems to be well settled that if railings or barriers are necessary for the security of travellers, the authorities charged with the duty of keeping the roads in repair and safe condition, must furnish them.

A number of cases on this subject are noted under sec. 788 of *Dillon on Corporations*, 3rd ed., and in *Harrison's Mun. Man.*, 3rd ed., p. 402

In Massachusetts, by the statute in force there, highways, bridges, &c., are required to "be *kept in repair*, so that the same may be *safe and convenient for travellers*;" and persons sustaining injury "by reason of any *defect or want of repair* which has existed for the space of twenty-four hours in any highway," may recover compensation.

Under this statute the case of *Palmer v. Inhabitants of Andover*, 2 Cush. 600, was decided. The accident there happened by reason of a bolt falling out when the carriage was descending a hill towards a bridge, by which the horses

became detached from the carriage. The road turned to cross the bridge, and the horses followed the road safely ; but the carriage, keeping straight on, was thrown off the road into a mill-pond, a casualty which might have been prevented if there had been a barrier at the turn of the road.

Dewey, J., giving the judgment of the Supreme Judicial Court of Massachusetts, thus states the conclusion on one branch of the case, at p. 607 : " So far as this defence is placed upon the ground, that the pole and harness became detached from the carriage, on a part of the highway which was not defective, and in consequence thereof the carriage passed out of the travelled part of the road, and the injury for which damages are claimed occurred by reason of a want of a railing at such place, without the ordinary travelled road, the Court are of opinion that the jury should have been instructed to enquire whether the want of such rail or barrier was a defect, and whether there ought to have been such a rail or barrier, for the proper security of persons travelling on this road ; and if so, then the neglect of the town to keep up such rail or barrier would shew such neglect of duty on their part, as would authorize the plaintiffs to maintain these actions, so far as this objection is interposed, if, in the opinion of the jury, such a barrier as would be required for ordinary travel would have prevented the happening of the injury complained of by the plaintiffs. If, on the other hand, a barrier suitable for ordinary travel, and of such a character as would have protected the town from an indictment, would not have prevented the injury, then the plaintiff ought not to recover."

It was held also, in that case that the plaintiff was not deprived of his right to recover by reason of the accident, being in part attributable to the breaking of the bolt, the plaintiff not being chargeable with negligence with respect to that occurrence.

This case was decided in 1849.

In 1856, the same learned Judge who delivered the judgment referred to it again in delivering the judgment of the Court in *Rowell v. The City of Lowell*, 7 Gray 100, at p. 102.



‘That case,” he said, “although not having the weight of a unanimous opinion of this Court, was deliberately considered and settled, and is to be taken to be the law of this commonwealth, applicable to similar cases. In coming to the result we did in that case, we were fully aware of the difficulty of drawing a well defined line between the cases where responsibility would, and where it would not attach to the town, when the injury was occasioned in part by other causes than that of a defective highway. Each case, as it occurs, must be decided, in that respect, upon its own peculiar circumstances.”

The Massachusetts statute differs from ours chiefly by the use of the words: “So that the same may be safe and convenient for travellers.” I understand these words as merely expressing what, without them, would be understood, viz., the object and purpose of the repairs, and not as materially affecting the construction of the clause.

The Connecticut statute contains words which seem to me essentially the same as our own. The enactment in that State is that the several towns shall make and *keep in good and sufficient repair* all the needful, highways, and bridges, &c., and if any person shall be injured in his person or property through or by means of a *defect in the road or bridge*, he may recover damages. The reports of the Supreme Court of Errors of that State shew that the law is construed there as requiring a fence or railing, when that is necessary, for the safety of travellers, as in the cases of *Town of Tolland v. Town of Willington*, 26 Conn. 578, and *Williams v. Town of Clinton*, 28 Conn. 264.

In the latest case which I have seen—*Bronson v. Town of Southbury*, 37 Conn. 199, decided in 1870, Foster, J., giving the judgment of the Court, says, at p. 201: “The principles of law which are applicable to, and which control this class of cases, have been so frequently and so recently considered by this Court that it is quite unnecessary to discuss or even to repeat and reaffirm them.”

And further on he says, at p. 201, 202: “We cannot recognize the claim made on behalf of the defendants, that this

bridge, if built higher, and provided with a railing, would certainly be destroyed or carried away by ice, &c., in the time of spring freshets, and therefore it was proper to leave it as it was, and as it had been for years. We believe it is feasible, without great expense, to erect a proper structure there, with proper guards and protections, which would be reasonably permanent. But should it prove otherwise, should parts or the whole of the works be carried away, and that frequently, while the law remains as it is we think the town is bound to restore it as often as it becomes necessary."

In New York, also, a statutory duty to repair is held to include a duty to fence, when that is required for the safety of travellers, as appears from the judgment of the Supreme Court of that State, in *Hyatt v. Village of Rondout*, 44 Barb. 385, decided in 1863, which was a case very closely resembling in its facts that now before us.

In my opinion the construction put upon these New England statutes is correct, and is entirely applicable to our own; and the obligation to keep the roads in repair makes it necessary to do whatever is required to make the road reasonably safe for ordinary travel, even though that should necessitate the construction of fences or other guards or barriers in places like that now in question.

On the other questions, as to the cause of the accident, I see no reason whatever to question the correctness of the conclusion arrived at in the Court below. The evidence is that the horse was frightened by a new plank or some other object, and that he shied and backed, an occurrence by no means uncommon, and one which, if the road was in a safe state, should occasion no danger.

There is nothing that I see in the evidence to make it necessary to find that the horse was ungovernable, in the sense in which that word is usually applied. The jury were not asked to find if, at the time of the accident, the plaintiffs were making the ordinary use of the road. The learned Judge was not asked to leave such a question to

them, and we cannot say that, upon the evidence before us, the jury ought to have been told that the plaintiffs were not making the ordinary use of the road. The jury have negatived negligence on the part of the plaintiffs.

The state of facts, therefore, on which this question is presented to us is, that the plaintiffs were making the ordinary use of the highway, when their horse, without any negligence on their part, shied, and backed, and by reason of the want of repair of the highway the wheels went over the bank.

It seems to me that the only answer required to the argument as to "proximate cause" is this bare statement of the facts.

I agree that the appeal should be dismissed with costs.

*Appeal dismissed with costs.*

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THE TORONTO STREET RAILWAY COMPANY, (Plaintiffs in the Court below,) *Appellants* v. FLEMING, (Defendant in the Court below,) *Respondent*.

*Toronto Street Railway—Assessment of.*

*Held*, reversing the judgment in this case, reported in 35 U. C. R. 264, that the Toronto Street Railway was not assessable for those portions of the streets occupied by them for the purposes of their railway, as being land, within the meaning of the Assessment Act, 32 Vic., ch. 36, O.

APPEAL from the decision of the Queen's Bench, holding that the portions of the streets of Toronto, held and used by the plaintiffs for the purposes of their railway, are liable to assessment by the corporation of Toronto, as real estate, within the meaning of sec. 3 of 32 Vic. ch. 36, O.

The facts are fully set out in the report of the case in the Queen's Bench, 35 U. C. R. 264.

March 16, 1875 (a), *Harrison*, Q. C., and *Ferguson*, for the appellants. *C. R. W. Biggar*, for the respondents.

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(a) Present—DRAPER, C. J. of Appeal; STRONG, J.; BURTON, J.; PATTERSON, J.

The argument was substantially the same as that reported in 35 U. C. R. 268, 269.

The grounds for and against the appeal, and the cases relied on, were as follows:

Reasons for the appeal,

1. The easement or privilege of the plaintiffs in the Court below is not "land," "real property," or "real estate" within the meaning of the Assessment Act 32 Vic. ch. 36, O.: *Governor, &c., of the Chelsea Water Works Co. v. Bowley*, 17 Q. B. 358; *West Chester Gas Co. v. County of Chester*, 30 Penn., 232; *Middlesex R. W. Co. v. City of Charlestown*, 8 Allen 330; *St. Louis v. Ferry Co.*, 11 Wallace 423. See also *Niagara Falls Suspension Bridge Co. v. Gardner*, 29 U. C. R. 194.

2. The provisions of the Assessment Act as to the rating land and collection of taxes, are wholly inapplicable to such an easement or privilege. See 32 Vic. ch. 36, secs. 21-33.

3. So far as the easement or privilege partakes of realty, it is exempt from taxation: 32 Vic. ch. 36, sec. 9, sub-sec. 6. See also, *Scragg v. The Corporation of the City of London*, 26 U. C. R. 263, 28 U. C. R. 457.

4. If the easement or privilege is to be looked upon as personalty, it is also as regards the company exempt from taxation, each shareholder being assessed for the value of the stock or shares held by him as part of his personal property: 32 Vic. ch. 36, sec. 36.

The following are the grounds of answer to the appeal, and the authorities relied on in support of them.

1. The property of the appellants, as stated in the Court below, is "land," "real property," and "real estate," within the meaning of the Assessment Act, 32 Vic. ch. 36, O., and is assessable as real estate: *Dillon on Municipal Corporations*, 2nd ed., 727, sec. 628, and note; *Appeal of North Beach and Mission R. W. Co., In re widening of Kearney Street*, 32 Cal., 499; *The People v. Cassity*, 2 Lan. N. Y. 294.

If the easement or franchise of the appellants stood alone, it is still real property: 1 *Steph. Com.*, 7th ed., 647,



648, 658; *Appeal of North Beach and Mission R. W. Co.*; *In re widening of Kearney Street*, 32 Cal. 499, 506; *Buckridge v. Ingram*, 2 Ves. 651; *Vauxhall Bridge Co. v. Sawyer*, 6 Ex. 504; *The Company of Proprietors of Waterloo Bridge Co. v. Cull*, 1 E. & E. 213; *Charing Cross Bridge Co. v. Mitchell*, 4 E. & B. 549; *Regina v. Hull Dock Co.*, 7 Q. B. 2.

But the appellants have also a legal interest in the "portions of streets occupied" by the road-bed and foundation of their tramway, in respect of which they are assessable as for "land" or "real estate:" 32 Vic. ch. 36, secs. 3, 9, 33; O.; *Providence and Worcester R. W. Co. v. Wright*, 2 Rhode Island, 459, 462; *Louisville City R. W. Co. v. City of Louisville*, 4 Bush. Ky., 478; in the same way as Gas Companies, who occupy land with their mains: *Providence Gas Co. v. Thurber*, 2 Rhode Is., 15, 21; *Commonwealth v. Lovell Gas Light Co.*, 12 Allen, 75; *Regina v. Cambridge Gas Light Co.*, 8 A. & E. 73, although these are laid under the streets; *Rex. v. Birmingham Gas Light and Coke Co.*, 1 B. & C. 506; *Rex. v. Brighton Gas Light and Coke Co.*, 5 B. & C. 466; or Water companies, whose pipes run beneath the streets: *Rex. v. Mayor, &c., of Bath*, 14 East 609; *Rex. v. The Company of Proprietors of Rochdale Water Works Co.*, 1 M. & S. 634; *Regina v. Proprietors of West Middlesex Water Works Co.*, 1 E. & E. 716; *Regina v. Company of Proprietors of the Birmingham Water Works Co.*, 1 B. & S. 84; *Regina v. The Company of Proprietors of East London Water Works Co.*, 18 Q. B. 705; or Telegraph Companies: *Electric Telegraph Co. v. Overseers of the Poor, &c., of Salford*, 11 Ex. 181.

And the superstructure of the appellants' road also is assessable as realty: 16 Vic. ch. 182, sec. 21; 32 Vic. O., ch. 36, sec. 3, O.; *Great Western R. W. Co. v. Rouse*, 15 U. C. R. 168; for these appellants are not a railway company and their "tramroad," is not within the purview of the Railway Acts: 32 Vic. ch. 36, sec. 36, O.

The very-general words of the Municipal and Assessment Acts are often inapplicable literally, to the particular cases

which arise in practice. See 32 Vic. sec. 9, sub-secs. 3, 7, O., and sec. 21, 26, 27, 38, 39, 40, 70, 78, 90, 92, 94, 95, 96, 115, 118; 29-30 Vic. ch. 51, sec. 256; 36 Vic. ch. 48, sec. 422 O.; *Regina ex rel. McGregor v. Kerr*, 7 U. C. L. J. 67; *Niagara Falls Suspension Bridge Co. v. Gardner*, 29 U. C. R. 194, 197, per Wilson, J.; *Scragg v. City of London*, 26 U. C. R. 263, 270, per Hagarty, C. J.: S. C. in App. 28 U. C. R. 475, 460, per Draper, C. J.; *Moore v. Esquesing*, 21 C. P. 277, 285, per Hagarty, C. J. See also *Regina v. Bloxam*, 1 A. & E. 388; *Regina v. Hull Dock Co.*, 7 Q. B. 2; *Chanter v. Glubb*, 9 B. & C. 479; *Regina v. Wistow*, 5 A. & E. 250.

3. The property of the appellants is not exempt under 32 Vic. ch. 36, sec. 9, sub-sec. 6, O.

The portions of street occupied by them are "public roads." They can claim no greater rights than the rest of the public: *Attorney-General v. Niagara Falls International Bridge Co.*, 20 Grant, 34, 42, 54; and their permanent way, and even their cars are obstructions; *Regina v. Plummer*, 30 U. C. R. 41.

But the general public character of these streets has been trenchanted upon to the extent of the appellants' special interest, and they are assessable in respect of that interest, in the same way as private persons who occupy crown property: *Lord Bute v. Grindall*, 1 T. R. 338; *Gambier v. Overseers, &c., of Lydford*, 3 E. & B. 346; *Netherton v. Ward*, 3 B. & Al. 21; *Rex v. Governor, &c., of Chelsea Water Works Co.*, 5 B. & Ad. 156; *Attorney-General v. Hill*, 2 M. & W. 160; *Mersey Docks Harbour Board v. Cameron*, 11 H. L. Cas. 443; *Regina v. The Inhabitants of St. Martin's, Leicester*, L. R. 2 Q. B. 493; *Commissioners of Leith Harbour, and Docks v. Inspector of the Poor*, L. R. 1 Sc. App. 17; for the exemption of crown property is not an inherent quality of the property itself, but simply a privilege of Government: *State of California v. Moore*, 12 Cal. 56; *Smith v. Guardians, &c., of Birmingham*, 7 E. & B. 483.

And statutes creating exemptions will be strictly con-

strued; *Dillon*, on Corporations, 2nd ed., 717, sec. 616; *Harrison's Mun. Man.* 3rd ed., 520, note *b*, and cases there cited.

September 18th, 1875—DRAPER, C. J., of Appeal (*a*).—I considered this case with much attention, and prepared a written judgment upon it. Unfortunately it has been mislaid. If there had been any doubt in my mind upon the question, I would have reconsidered the question involved. But in addition to my having arrived at what I deemed a satisfactory conclusion, I was favoured with a perusal of the judgment which will be delivered by my brother Burton, and which contains all that I had intended to say upon the subject; and I will, therefore, do no more than recapitulate the grounds of my opinion.

1. That the decisions upon the statute of Elizabeth, 43 Eliz., ch. 2, are not applicable, by reason of the difference between that Act and our Assessment Acts. That statute directs the poor rate to be raised “by taxation of every inhabitant, parson, vicar, and other, and every *occupier* of lands, houses,” &c.

Our statute imposes the assessment on *property* real and personal.

2. There are decisions of the Courts in England by which we are bound, and which I cannot in principle distinguish from this case—which affix the character of an easement on property of a similar character to that possessed by the Street Railway Company in this case. Our assessment laws do not include easements as the subject of municipal taxes.

I concur with my brother Burton in his reasons and conclusions.

BURTON, J.—This is a special case under the provisions of the Common Law Procedure Act, without pleadings, for the purpose of raising the question of whether the permanent way or track of the plaintiffs' railway is liable to be

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(*a*) *Present*—DRAPER, C. J. of Appeal, STRONG, J., BURTON, J., PATTERSON, J.

assessed as real estate, it being admitted that the plaintiffs are not otherwise liable to be assessed in respect of it, and that they had no residence or place of business within the limits of the city.

The right and title of the plaintiffs to the railway, its franchises and appurtenances, were held under an Act of the Parliament of Ontario, 36 Vic., ch. 101, which incorporated them and legalized the agreement previously entered into with one Easton for its construction, and the purchase by and sale and conveyance of such railway and franchises to the president of the plaintiffs' company. The agreement, by-laws of the corporation, and Act of Parliament are fully referred to in the statement of the case, and the report of the judgment of the Court below.

The assessment was in respect of taxes for the year 1873, under the provisions of the Assessment Act of 1869, and the sole question for decision was whether it was legally liable to be assessed as real estate.

The Court of Queen's Bench have held that it was so liable, and this appeal is against that decision.

If this were a question arising under an Act similar in its provisions to the 43 Eliz. ch. 2, I should have no hesitation in concurring in the conclusion arrived at by the learned Chief Justice of the Court below, and by Mr. Justice Wilson; but with the utmost respect and deference for their opinion, I have been unable, after a very careful consideration of the cases cited there and on the argument before us, to convince myself that these defendants are liable upon the assessment which has been made upon their railway, treating it as real estate.

The statute of Elizabeth was passed to throw a *personal charge* upon the occupiers of every description of real estate, but it was a personal charge only, not a charge upon the land. Our Assessment Act, on the other hand, does not profess to rate the individual in respect of the property or the occupation of it, but provides that all land and personal property shall be liable to taxation, and then provides the machinery by which the assessment shall be made and the



taxes levied. A man is not assessed by reason of his occupation of or having some estate or interest in the land, and the assessment made according to the value of that occupation or interest, but the land itself; the corpus, so to speak is taxed, and the owner and the occupant are both made liable for the payment of the tax thus imposed upon it.

This Act, like the land tax acts in England, contemplates, in my opinion, property to be let by a landlord to a tenant. The whole scope of each of them is to throw the tax as a charge upon the landlord, and the tenant having paid it is entitled to deduct it out of the rent; and the provisions in reference to the sale in the event of non-payment, are wholly inapplicable to such a subject as the property sought now to be taxed.

If this can be treated as non-resident land, the owners of which have requested to be placed upon the roll, this extraordinary result might follow—that the collector being authorized, by section 97, to make distress upon any goods or chattels which may be found thereon, any traveller upon the highway whose horse or vehicle may be upon the portion occupied by the track will be liable to have them distrained for payment of this tax.

Then by section 107 the taxes if unpaid shall be a special lien, not upon the company's interest, but upon the land.

The sale too (and the deed executed in pursuance of it) is not confined to the interest of the party assessed, but the sale is of the land itself, and it is expressly declared that it shall be final and binding upon the former owners of the land, and upon all persons claiming by through or under them.

By section 138 the treasurer is to sell so much of the lot as may be sufficient to discharge the taxes. During the twelve months allowed for redemption, the purchaser is entitled to possession.

All these provisions seem to me to be inconsistent with the view that the interest of this company can be treated as land within the meaning of the Assessment Act; no doubt it is an occupation of land, and the company as

occupiers would, under the long current of decisions upon the statute of Elizabeth, be liable in England to be rated for the relief of the poor.

The rails and sleepers by being affixed to the realty become part of that realty, but this cannot have the effect of making that realty taxable, which the law has declared to be exempt. The ownership of the soil may be in individuals subject to the rights of the public, or in the municipality, or in Her Majesty; in either case the same, if used as a public road, or way, or square, is exempt; the rails no longer remain chattels, but become part of that to which they are affixed, and if that be declared by law to be exempt, it does not lie in the power of a municipality or of a Court of law to say that that exemption shall be partially inoperative, nor can sub-sec. 7 of sec. 9, be invoked. That sub-section was inserted or amended to meet the case which presented itself in *Scragg v. The Corporation of the City of London*, 26 U. C. R. 263, 28 U. C. R. 457, and affords a strong argument that by making special provisions in the case there referred to, whilst the exemption under sub-sec. 6, is absolute, it was intended that this property should not be taxable; and it will be seen, however absurd it may seem for a municipality to tax its own property, that *the property* of a municipality when occupied by a tenant or lessee other than a servant or officer of the corporation for the purposes thereof, is not exempt.

The learned Chief Justice of the Queen's Bench admits that if the case of the *Chelsea Water Works Company v. Bowley*, 17 Q. B. 358, stood alone, it would be a strong authority to show that the plaintiffs' interest in the soil was a mere easement, and not liable therefore to be rated as land.

For the reasons I have given, I am of opinion that the assessment cannot be maintained, even though the plaintiffs' interest were more than an easement; but the case of the *Chelsea Water Works Company v. Bowley*, 17 Q. B. 358, decided, as I have already stated, under a statute much more analogous to our own, has been cited with approval, in several more recent cases, and does not, in fact, conflict with any of them.

In *Regina v. The Company of Proprietors of the East London Water Works Co.*, 18 Q. B. 705, the same learned Judge, Lord Campbell, who decided the previous case, delivered the judgment of the Court, and after referring to the statute of Elizabeth, and that by a long series of cases it had been decided that water and gas companies were under that statute liable as *occupiers of land*, in respect of their pipes which were laid beneath the soil, came to the conclusion that they were justified in holding that the company, who were the defendants in that case, were also ratable *in the same character*, under the statute then under review, by which it was provided that the rate should be laid on all persons "who should inhabit, hold, *occupy*, possess, or enjoy any houses, lands, tenements, or hereditaments, and he distinguished the case on that ground from *Chelsea Water Works v. Bowley*, 17 Q. B. 358.

And Coleridge, J., remarks, p. 716, "Where the same words occur in different Acts having a similar object, we should endeavour to adopt the same construction in each case. The words in the local Act here are even more extensive than those in 43 Eliz. ch. 2; and, therefore, there is no reason for giving a less extensive construction to the former than in the latter."

And in *Regina v. Company of Proprietors of West Middlesex Water Works Co.*, 1 E. & E. 720, referred to by the learned Chief Justice as apparently inconsistent with Lord Campbell's former decision, it is expressly held that the company had no legal or equitable interest in the land, but the case was decided on the question of occupation merely, and in accordance with all the previous decisions under the statute of Elizabeth.

I am of opinion, therefore, that the property of the company referred to in the case was not liable to assessment as real estate, and it is a satisfaction to feel in arriving at that conclusion no injustice is done, as the capital stock of the company, in the hands of the shareholders, is assessed or liable to be assessed; whereas a contrary decision would render the company liable to be taxed not only upon its

capital, but also upon the iron rails and other property in which that capital has been invested. I agree, therefore, with the other members of this Court, that the judgment of the Court below should be reversed.

PATTERSON, J.—The case states, *first*, that the plaintiffs are the proprietors of the railway known as the Toronto Street Railway, situate on Yonge street, Queen street, and King street, in Toronto: that portions of the permanent way or track are situate on the public streets in five different wards of the city—the meaning of which statement I take to be that the three streets named are public streets, and that the railway laid on them runs in the five wards:

*Second*, that the assessment in question is, in respect of the portions of Queen street, Yonge street, and King street used by the plaintiffs for the purposes of their said railway, under the provisions and statutes and by-law set out and referred to under the third and fourth heads:

And *fifth*, that the assessment was made under the Assessment Act of 1869, for taxes for 1873. And the question stated is, whether the said property of the plaintiffs in the said wards, or any of them, was, under all the circumstances, liable to such assessment by the city.

And it is stated to be agreed and admitted that the plaintiffs had no residence or place of business within the City of Toronto, and that unless the property could be assessed as *real estate* within the meaning of the assessment Act, it could not be assessed by the city.

By “real estate” I understand the parties to mean “land.” Section 9 of the Act, which states what property shall be taxable, uses the word “land,” and not the words “real estate,” and it is by no means clear that in the Act the terms are synonymous. They were so by express enactment in 13–14 Vic. ch. 67, and in 16 Vic. ch. 182. But in consolidating the latter statute, Consol. Stat. U. C. ch. 55 sec. 3, the form of words was used which has been preserved in section 3 of the Act of 1869, declaring that the terms “land,” “real property,” and “real estate”



respectively shall include certain things—not including *the land itself*, which was included in the definition in 13–14 Vic. ch. 67.

The land itself must be held to be included in the meaning of the word “land ;” but “real estate” and “real property,” which are not now declared, as they were in the two earlier Acts, to mean the same thing as “land,” have a legal signification, which embraces many interests, to express which the word “land” is not appropriate.

I do not know that the Assessment Act assumes to deal with any interests in land which require to be expressed by any term more comprehensive than the word “land,” although the words “real estate” are often used ; but for our present purpose it is necessary to note that “land” is the word used in section 9. “All land and personal property in the Province of Ontario shall be liable to taxation, subject to the following exemptions :”

The personal property of an incorporated company is, by section 36, protected from assessment against the corporation ; therefore, unless the plaintiffs are assessable for *land* within the meaning of the Act, they are not assessable at all.

It seems to me quite clear that by *land*, in section 9, is meant the soil itself, including those things mentioned in section 3, viz., all buildings or other things erected upon or affixed to the land, and all machinery or other things so fixed to any building as to form in law part of the realty, and all trees or underwood growing upon the land, and all mines, minerals, quarries and fossils in and under the same, except mines belonging to her Majesty ; all of which, without the aid of section 3, would in law be part of the land.

The absence from section 3 of all reference to estates or interests in land, and all the provisions of the Act respecting the mode of assessment, as in sections 21 to 34, and the provisions for the sale of lands for non-payment of taxes, make it perfectly apparent that it is the soil itself that is the subject of assessment and sale.

In the case of land vested in Her Majesty, occupied by any person otherwise than in an official capacity, sub-

section 2 of section 9, provides that "the occupant shall be assessed in respect thereof, but the property itself shall not be liable ;" and section 127, providing for the sale of unpatented lands, saves the right of the Crown therein ; but all other lands which are taxable are liable to be sold. Even lands belonging to a municipality, if occupied by a tenant, are taxable and saleable in precisely the same way as the lands of any ratepayer, being excepted by sub-section 7 of section 9 from the exemptions. There is no provision for taxing or selling the term or interest of the tenant ; the *land* is to be assessed, and, therefore, the *land* is liable to be sold.

The plaintiffs in this case are doubtless occupiers of land. The cases referred to in the judgments of the learned Judges in the Court below, and the late case of *The Pimlico, &c., Tramway Co. v. Greenwich*, L. R. 9 Q. B. 9, abundantly establish that position. The rights secured to the plaintiffs under the statutes and by-law set out in the case, and their occupation of the streets under those rights, constitute property which is doubtless of great value to them.

If there was a general law that all property should be assessable for municipal purposes, I should have no hesitation in deciding that this was assessable property. The question however is, is it assessable as land.

Sub-section 6 of section 9, exempts every public road and way or public square.

The property of these defendants is only land as being part of the public street. The facts stated in the case are that the streets in question are public streets, and that the assessment is in respect of the portions of the streets used for the purposes of the railway.

If this land is taxable, it is liable to be sold for non-payment of taxes. In order to sell any right or interest or franchise, or anything but the very land itself, some provision of law would be necessary, which I do not find in the Assessment Act.

Without resorting to the exemption in sub-section 6, I should hold that the whole scope of the Act, including the

provisions for valuing land, the mode of assessment, the proceedings for the sale and conveyance of the land, and the occupation of it by the purchaser, are so inapplicable as to shew that this property is not taxable land; but having regard to the exemption of every public road, there is not in my judgment room for further argument. The streets remain public streets, and the plaintiffs are bound to keep them in such a state as that their railway shall not prevent the use of the street by ordinary vehicles.

What is it that is exempted by sub-section 6—the soil or the right of way over the soil? Evidently the soil itself, because the soil alone and not a right of way is *land* and taxable unless exempted, and because, although the word “way” or even the word “road” may be ambiguous, there is no ambiguity in the words “public square” which occur in the same sub-section.

In *Municipality of the Town of Guelph v. Canada Co.*, 4 Grant 632, the Market square of Guelph was held to be dedicated to the public, and to be in fact a “public square,” although the freehold remained in the Canada Company. I apprehend that under sub-section 6, the soil of that square would be exempt from taxation against the Canada Company who owned it, and that the exemption would not be confined to the public right to use the square.

Then, if the soil of the street is exempt, I find nothing in the Act to say that that portion of it is not exempt which is occupied by the plaintiffs’ railway while still remaining a part of the public road; but is to be taxed, and to be (as the consequence would be) sold in case the taxes are not paid.

The case cited of *Chelsea Water Works Co. v. Bowley*, 17 Q. B. 358, is very strongly in point, as under 38 Geo. III. ch. 5, the land tax is chargeable to the persons holding lands or hereditaments, and (amongst other points of resemblance) the tax is thrown on the landlord by a provision very similar to section 28 of our Assessment Act, while the statute 43 Eliz. ch. 2, under which the cases as to occupiers of land are decided, throws the poor rate on the occupier personally, and not on the land.

I agree in the conclusion arrived at by Mr. Justice Morrison in the Court below, and am of opinion that the judgment should be reversed.

*Appeal allowed.*



TRINITY TERM, 39 VICTORIA, 1875,

(August 23rd to September 4th).

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*Present :*

THE HON. WILLIAM BUELL RICHARDS, C.J. (a)

“ JOSEPH CURRAN MORRISON, J.

“ ADAM WILSON, J.

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CUMMINS v. MOORE.

*Notice of action—Evidence of bona fides.*

A magistrate having entertained a case under the Master and Servant's Act, C. S. U. C. ch. 75, as amended by 29 Vic. ch. 33, D., and convicted the plaintiff, notwithstanding more than a month had elapsed since the termination of the engagement, and although he was told that he had no jurisdiction, and was shewn a professional opinion to that effect and referred to the statute: *Held*, that the jury were warranted in finding that he did not *bonâ fide* believe that he was acting in the execution of his duty in a matter within his jurisdiction; and that he was therefore not entitled to notice of action.

APPEAL from the County Court of Wellington.

Declaration, that the defendant was a justice of the peace for the said county, and pretending and assuming to act as such justice, but without any authority or jurisdiction in that behalf, and without a *bonâ fide* belief that he was doing his duty as such justice in the execution of his office, caused a distress to be levied at the premises of the plaintiff in the said county upon his cattle, goods and chattels, and the same to be seized thereunder, and kept and detained the same until payment by the plaintiff of a sum of twelve dollars and sixty-seven and a half cents, which the defendant had adjudged the plaintiff to pay under and by virtue of a conviction before

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(a) RICHARDS, C. J., was not present at any of the arguments during this term.

him made ; whereby the plaintiff was compelled to pay the said sum of money to free his cattle, goods, and chattels from the distress and seizure, and was also put to great costs and charges in and about obtaining a writ of *certiorari* to remove the said conviction into the Court of Queen's Bench and obtaining a rule to quash the conviction, and the conviction was by the said Court quashed in due form of law before the commencement of this action ; and the plaintiff otherwise incurred great expenses, costs, charges, &c.

Second count in trover.

Plea : general issue by statute : Consol. Stat. U. C. ch. 126, secs. 1, 9, 10, 11. Issue.

The cause was tried by the Judge of the County Court with a jury, sometime before the last January term.

The evidence was as follows :

The *plaintiff* said : Thomas Lynch worked for me in 1873. He quit working on the 31st July, 1873, that was the last day. I was summoned on the 29th September, before Mr. Moore. At the time mentioned I took the paper over to him which I produce now (letter and opinion of Oliver & Macdonald). I had consulted them. I was advised that defendant could not try the case. When Lynch gave his evidence I objected to his jurisdiction and gave him the paper produced. He looked it over and then to his law books. He said the paper did not refer to the case. Warner suggested to settle. I said I was willing. Defendant said he had commenced the case and he must go on with it. I objected again and said I would look to him for what followed. He said he did not care what Oliver & Macdonald said.

*John Carter*, the constable, who was present before the magistrate said : After looking at the law books defendant said he would go on with the case.

*Charles Barnard* said : At the trial before defendant, plaintiff objected. He handed a paper to defendant. I understood the objection to be that the time was overrun within which the defendant could have gone on with the case. Defendant read the paper, looked at his books

and thought he had a *right to go on* with the case. He said his own books were correct, and he had a right to go on with the case. There would have been a settlement but for the costs. Neither party would pay the costs: when Moore said he would go on with the case. Defendant got his own law book. After that he said he had a right to go on. He seemed satisfied he was right in going on with the case. Statute book he got. It was Master and Servants' Act.

For the defence. The *defendant* said: I was under the impression I had full power to act. A paper was put into my hands. I can't say if it was the one produced. I got statute and compared it, and it had no reference to my not having power to dispose of the case. I didn't understand that if a month had expired that I could not proceed. I did firmly believe I had right to act.

In cross-examination he said: I did not know there was such an amendment as is said to be. Cummins objected in writing. I could not say that he objected that a month had elapsed. I compared the paper with the Master and Servants' Act. I did not refer to any other act than the Master and Servants' Act, Consol. Stat. U. C.; that was the only act I read. I did not notice anything about the 21 days. I was not aware of the amendment. I could not exactly say what the objection was. It was about the month having expired. I over-ruled the objection on the ground that it had no limitation of the Master and Servants' Act. I say the evidence of Lynch did shew that it was within a month. I say that I am under the impression the evidence shews work was done within a month. I will not swear Warren swore Lynch worked in August.

*James Warren* said: I could not have said in what month Lynch was working, as I did not know.

*William Hemstead* said: Plaintiff objected to the case going on. Laid a paper on the table. Defendant went to his room, got a book, and seemed to think he was correct in going on with the case. Could not tell very well how it was. Did not attend to the paper. Defendant said he thought he

had a right to try the case. Nothing happened to lead me to suppose that the defendant did know he could not go on with the case.

The learned Judge told the jury that the defendant could not be said to be acting in good faith, if he chose, after the objection taken and the statute was pointed out to him, to remain wilfully ignorant on the objection taken to his jurisdiction.

A verdict was rendered for the plaintiff and damages were assessed at \$76.

In January term the defendant obtained a rule calling on the plaintiff to show cause why the verdict should not be set aside and a nonsuit entered, or a new trial be granted, or the damages be reduced to three cents, on the grounds that (covering the many exceptions which were taken at the trial) the evidence and weight of evidence shew the defendant acted *bonâ fide* as a justice of the peace and with reasonable and probable cause in the proceedings and acts complained of, and without malice or *mala fides*; and that the verdict was contrary to law, evidence, and weight of evidence; and on the ground that the action was not brought within sufficient time as provided by the statute against the defendant, who acted as a justice of the peace according to the evidence, namely, within six months after the act complained of was committed. And on the ground that no notice of action was given to the defendant as required by the statute, he being and acting as justice of the peace, in the proceedings and matters complained of; and on the ground that there was not due, proper, or sufficient proof of the alleged conviction or proceedings complained of as having been made by the defendant, or of any order or writ quashing or setting aside the same; and on the ground that insufficient and inadmissible evidence in respect thereof was allowed to be and was given; and on the ground that there was no evidence of want of jurisdiction by the defendant in the proceedings had before or taken by him; and because it was not proven at the trial of this cause that it was proven before the defendant



that more than one month had elapsed since the time of service of the plaintiff's servant had expired, and in respect of whose wages the order complained of was made; and on the ground that the evidence shews the defendant as a justice of the peace, had jurisdiction in the matter or case before him in which the order was made; that *prima facie* the defendant, as a Justice of the Peace, had jurisdiction, as it was a case between master and servant, and it was not shown that the defendant knew that he had no jurisdiction; and that the limitation clause requiring the action to be brought within six months after the cause of action arises applies whether the defendant had jurisdiction or not, and more than six months had elapsed after the cause of action arose before the action was commenced; and that there was no legal evidence of what happened at the trial before the defendant; and that the damages were excessive, and not justified by the evidence or the nature of the case, and should be reduced to three cents, in any event, pursuant to the statute, the jury having found that the wages were due in respect of which the order complained of was made; and that the Judge's charge as set out above, which was objected to, was erroneous.

The learned Judge of the County Court was of opinion, that the warrant under which the constable levied having been given by him to the defendant, who had been served with notice to produce it, secondary evidence, which was given and received, was admissible; and the seizure of the plaintiff's goods having been proved, the rule of the Court of Queen's Bench which was produced proved the quashing of the conviction: and he was of opinion that the plaintiff must fail in his action of trespass, as the matter before the defendant as a justice of the peace was within the scope of his jurisdiction, and he merely made "a mistake in construing the meaning of the statutes, to which the opinion of Oliver & Macdonald contributed, as they refer to the original act as one which gave the

justice power to try the case," and he directed a nonsuit to be entered.

The plaintiff appealed from that decision, for the following reasons :

1. There was evidence to go to the jury of the defendant having acted without a *bond fide* belief that he was doing his duty.

2. That there was evidence to go to the jury that the defendant remained wilfully ignorant of his duty.

3. That the defendant in his rule *nisi* did not ask for a nonsuit on the ground that was no evidence to go to the jury, but on the ground that the evidence and weight of evidence shewed that the defendant acted *bond fide* as a justice, &c., and that the jury having determined the evidence and weight of evidence to be in the plaintiff's favour it was conclusive.

4. That the jury having specially found that the defendant remained wilfully ignorant of his duty, the verdict ought not to have been set aside.

5. That on the finding of the jury the defendant was not entitled to set up either that there was no notice of action nor that the action was not commenced within six months next after the act complained of was committed; and

6. That the decision of the learned Judge ordering a nonsuit to be entered was against law and evidence.

August 27, 1875, *Harrison*, Q. C., for the appellant. The defendant's counsel will rely on the numerous exceptions he took in the Court below. The warrant it will be seen was not produced, but it was proved by secondary evidence, it having been traced to the possession of the defendant and notice to produce it was duly served upon him. Then it will be said the conviction was not proved, but it was proved by a certificate of a copy of it from the clerk of the crown in whose custody the original is: Consol. Stat. C. ch. 80, sec. 5; *Warren v. Deslippe*, 33 U. C. R. 59; *Regina v. Weaver*, L. R. 2 C. C. 85. The plaintiff contends, as he did

in the Court below, that the defendant was not acting as a justice of the peace: that he had exceeded his jurisdiction and knew he was exceeding it, because he was told of it by a letter written by professional gentlemen, and he was referred to the statutes bearing on the subject, which shewed plainly he had no authority under the circumstances. The defendant did not therefore believe he had authority to deal with the case, for he could not have believed it in the face of the statute he was referred to. The Consol. Stat. U. C., ch. 75, sec. 12, gave the servant the right to complain of his master to a justice of the peace for the non-payment of wages, among other things, and no time is mentioned in that section within which the magistrate may entertain the complaint. The 29 Vic., ch. 33, amending it, authorizes such complaints to be made after the termination of the engagement between master and servant, "provided that proceedings be taken within one month after the engagement shall have ceased." Now the defendant acted in this case when more than a month had elapsed after the engagement had ceased, and he was told he could not do so, and was referred to the statute on the subject, but he nevertheless decided he had power to act and he did act. He was not acting as a magistrate on this occasion in good faith, for he had no ground for believing he had jurisdiction. He was not therefore entitled to notice of action, nor was he entitled to the limitation of six months, nor can he have a verdict of only three cents entered against him, although the plaintiff did owe the wages that were claimed of him.

He referred to the following cases: *McCance v. Bate-man*, 12 C. P. 469; *Friel v. Ferguson*, 15 C. P. 584; *Graham v. McArthur*, 25 U. C. R. 478, and *note*, 484; *Neill v. McMillan*, *Ib.* 485; *Downing v. Capel*, L. R. 2 C. P. 461; *Cook v. Leonard*, 6 B. & C. 351; *Cann v. Clipperton*, 10 A. & E. 582-8; *Leete v. Hart*, L. R. 3 C. P. 322; *Chamberlain v. King*, L. R. 6 C. P. 474; *Connors v. Darling*, 23 U. C. R. 541; *Hardy v. Ryle*, 9 B. & C. 603, 601; *Sprung v. Anderson*, 23 C. P. 152.

*M. C. Cameron, Q.C., contra.* The decision of the learned County Court Judge is quite correct. His judgment states fully the grounds upon which he acted, and he has rightly reasoned out that upon the evidence given the defendant was acting as a magistrate, and that he believed he had authority to act between the parties, and that at most, if he were in error, he acted when there was reasonable ground to entertain a doubt as to the true construction of the statute, and he erred in judgment only. The question in such a case is, whether the defendant did an act in the execution of his duty as a justice of the peace—Consol. Stat. U. C., ch. 126, sec. 1—not whether he believed he had authority to act in the matter as such justice. He is to be protected as well, and more particularly, when he has no jurisdiction, as when he has. As the defendant had received no notice of action he is entitled to have the nonsuit stand, and under any circumstances there should not be a verdict against him for more than three cents, because the plaintiff was in fact and on the merits rightly convicted of owing his servant the wages prosecuted for. He referred to *Hermann v. Seneschal*, 13 C. B. N. S. 302; *Booth v. Clive*, 10 C. B. 827; *Denison v. Cunningham*, 35 U. C. R. 383; *Bross v. Huber*, 15 U. C. R. 625; *Snyder v. Shibley*, 21 C. P. 518.

September 17, 1875. WILSON, J.—There is no fault to find with the ruling of the learned Judge as to the reception of the evidence as to the warrant and of the documents produced to prove the conviction and its being quashed.

The only matter requiring consideration is, whether such a case was proved against the defendant as to withdraw from him the protecting enactments of the statute with respect to the notice of action or to the entry of a reduced verdict of three cents damages only. That depends upon the facts of the trial and upon the direction which the Judge should give to the jury in such a case. The facts bearing upon this part of the case are mentioned above.



The learned Judge in his judgment on disposing of the rule said: "Where there are facts which tend to show misconduct or a want of good faith on the part of the justice, no doubt it is a question for the jury, but the question here is, whether there is any evidence which should have gone to the jury to support the charge of bad faith on the part of the defendant." And he was of opinion there was not, and he nonsuited the plaintiff.

The direction proper to be given to the jury when a case of this kind is referred to them is, what may be gathered from the following decisions: "Whether the defendant believed that the facts existed which would bring the case within the statute \* \* and honestly intended to put the law in force. \* \* Whether the defendant had reasonable ground for that belief was, I think, a question subordinate to the governing question—very material for the consideration of the jury, and very material for the consideration of the court after the finding of the jury upon the main question. That being so, and the jury having found that the defendant did really believe that the plaintiff had passed him a counterfeit coin, and did honestly intend to put the law in force against him—which I take to be the meaning of the finding that the defendant acted *bonâ fide*, and, as I am clearly of opinion that the facts were sufficient to justify that conclusion, I do not think the other part of the finding, viz., that the defendant had no reasonable ground for such his belief, entitles the plaintiff to retain the verdict," per Erle, C. J. in *Hermann v. Seneschal*, 15 C. B. N. S. 392, 402.

Williams, J., said in the same case, at p. 404: "If the defendant had *bonâ fide* believed that the plaintiff was guilty of the offence, the case falls within the principle of *Booth v. Clive*, 10 C. B. 827, and the reasonableness of his belief as an independent question would be immaterial, though it might be taken into consideration in conjunction with the other facts of the case in determining whether or not the defendant did *bonâ fide* believe in the plaintiff's guilt. Whether he judged reasonably or not, if

he acted *bonâ fide*, the defendant was entitled to notice of action." See also *Roberts v. Orchard*, 2 H. & C. 769.

In *Leete v. Hart*, L. R. 3 C. P. 322, it is intimated that honest belief in a state of facts, which, if true, would have afforded a justification would not alone answer, unless the the defendant had reasonable grounds for his belief.

In *Chamberlain v. King*, L. R. 6 C. P. 474, the case of *Leete v. Hart* just referred to is not approved of, but it is said "while it is not necessary the party should have reasonable ground for believing in the existence of the facts upon which he acts. But there must be some facts existing which might give rise to an honest belief, or upon which a belief might be based."

In *Walker v. Nottingham Board of Guardians*, 28 L. T. N. S. 308, it was held that the defendants were entitled to a notice of action "when acting in the discharge of their duty," unless it be shewn that they have acted *malâ fide*, and it is to be assumed in the absence of proof to the contrary that they have acted *bonâ fide*.

In the present case the evidence shews the defendant was told by the plaintiff before he entered on the evidence of the charge that he had no jurisdiction, and the plaintiff showed him a letter from two professional men stating in effect that the Consol. Stat. U. C. ch. 75, had been amended by a later Act, and that the defendant could not adjudicate upon such a matter, unless he did so within one month from the termination of the contract or engagement between them. The defendant himself says the objection "was about the month having expired," and "I did understand that if a month had elapsed that I could not proceed."

The evidence as to the month having expired a good while, that is for three or four weeks before the time of the complaint made, was all against the defendant.

He knew at the trial that in the face of the evidence for the plaintiff on that point, he had to shew some fact or matter from or upon which it might be said he believed the month had not expired, and he did then say ; "I say the evidence of Lynch did shew that it was within

one month. I say that I am under the impression the evidence shews work was done within a month. I returned Warner's evidence. I will not swear that Warner swore that "he (Lynch) worked in August." Warner was called, and said that he did not say so. And the evidence was not produced to shew that Lynch, who was not present at the trial, did say so.

I think it very improbable that Lynch did say so in fact, for the whole contention was, that the month being then past the defendant could not proceed, and the defendant says: "I over-ruled the objection on the ground that it had no limitation of the Masters and Servants' Act," not because he found service performed within the month, nor the agreement continuing up to a period within the act.

Did the defendant then believe in the existence of a state of facts which, if true, would have justified him in acting under the statute or in his office as a justice of the peace on the occasion in question; that is, did he honestly believe that in acting between the parties he had jurisdiction over the matter in controversy, and, that the agreement between them had terminated at a period within or not more than a month from the time when the complaint was made to him?

If he had not said he knew that if a month had elapsed he could not proceed, I should have added to what I have said above, "or did he proceed under the original Act in ignorance of the amendment, or without knowing that he must exercise his powers within the period of the month, or under the honest belief that notwithstanding the limitation he had still the right to act?"

A person proceeding under a statute in ignorance of its repeal, is still entitled to notice of action: *Selmes v. Judge*, L. R. 6 Q. B. 724.

If this cause had been tried by a Judge alone he should, in my opinion, have found a verdict for the plaintiff. As there was a jury there was certainly evidence which should have been left to them. There was no evidence, I may

almost say, for the defendant at all. He did not honestly believe the month had not elapsed. He knew it had elapsed, and he knew if it had he had no power to act, yet he did act.

In *Downing v. Capel*, L. R. 2 C. P. 461, certain proceedings were authorized by statute to be taken against persons *found committing* offences, and the following case occurred: The defendant bought two pine apples from the plaintiff, who was to leave them at the defendant's house; he did so and was paid by the defendant's butler about one o'clock; the defendant went home about three o'clock and was told by the butler that he had paid for the pine apples. The defendant being under the impression that he himself had paid the plaintiff for the pine apples, sent for a policeman, who, with the defendant's butler and by the defendant's direction, arrested the plaintiff that evening on a charge of obtaining money under false pretences. The charge was dismissed. The defendant was mistaken in supposing he had paid the plaintiff himself. No notice of action was given. The question was, whether the defendant was entitled to notice.

It was held that as the act was committed by the plaintiff at one o'clock, and he was not followed for it till three o'clock and so the defendant had not *immediately* proceeded against the plaintiff as a person who was *found committing* an offence.

Keating J., said, p. 464: "I do not think that the defendant can have believed that the plaintiff was arrested immediately after having been found committing the offence."

Montague Smith, J., said, p. 465: "To entitle the defendant to notice of this action he should have given evidence to shew not only that he believed in a state of facts which shewed that the offence had been committed, but that he believed in a state of facts which shewed that the plaintiff had been found committing the offence, and had been apprehended after fresh pursuit. There was nothing like fresh pursuit."



It was said to be fresh pursuit after the supposed discovery of the offence, not after the plaintiff was found committing it.

See also *Roberts v. Orchard*, 2 H. & C. 769, and *Leete v. Hart*, L. R. 3 C. P. 322.

I am of opinion the case was rightly left to the jury by the learned Judge, and that he could not properly have withdrawn it from them upon the facts proved, and that their verdict was right in law and on the merits, and should not have been interfered with.

It is to be regretted that a difference of fifty cents between the plaintiff and Lynch in the wages was the cause of their dispute, or the cause of their not settling, and that afterwards the trifling costs of the defendant up to and at the time of the hearing prevented a settlement again.

My brother Morrison is of opinion that as the question of *bona fides* was expressly submitted to the jury and found by them adversely to the defendant, and there is evidence which will support the verdict, he cannot say that the matter is properly now open to the defendant.

Under these circumstances, while we are obliged to allow the appeal, we shall do so without costs, and we further order that the rule to shew cause and the rule absolute made thereon in the Court below be discharged.

*Appeal allowed without costs.*

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## LAMB AND ANOTHER V. SUTHERLAND : LAMB V. ALLEN.

*Equitable assignment of debt.*

The defendant purchased goods from L., who said that he would draw on defendant through the Merchants' Bank, and did so; and the manager of the bank swore that he discounted the bill for L. on the faith of L.'s representation that defendant owed him the money and would call and accept it: *Held*, that this was not sufficient to constitute an equitable assignment of the debt by L. to the bank; and that the payment of the draft by the defendant to the bank after L.'s insolvency, was therefore no defence against a purchaser of L.'s estate from the official assignee, in an action for the price of the goods.

ACTION by the plaintiffs as transferees and purchasers from John Mason, the official assignee in insolvency of the estate and effects of William Lottridge, an insolvent, under the Insolvency Act of 1869, in which the plaintiffs alleged that the defendant was indebted to William Lottridge in \$471.29 for money payable by the defendant to William Lottridge for goods sold and delivered by the said Lottridge to the defendant.

Pleas 1. Never indebted. 2. Payment.

3. That Lottridge, before his assignment in insolvency, made an equitable assignment of the claim declared upon to the Merchants' Bank of Canada, and the plaintiffs are not the holders thereof.

4. On equitable grounds—that previous to such assignment Lottridge applied to the Merchants' Bank of Canada for an advance of moneys, and to induce the Bank to make such advance Lottridge gave to the Bank a bill of exchange or order, whereby he required the defendant to pay the Bank a sum covering the full amount of the defendant's indebtedness to Lottridge. And the Bank did advance such moneys upon the security of such order, and upon the understanding then had between them and Lottridge that such order was intended to transfer to them the moneys so due from the defendant, and that the defendant would accept the same; and the defendant afterwards, in accordance with such order, did pay to the Bank the amount thereof, whereby the indebtedness of the defendant became and was fully satisfied and discharged.

5. On equitable grounds, as to the sum of \$442.39, precisely the same as the fourth plea, and payment by the defendant of that sum to the Bank.

Issue.

The cause was tried at the last Summer Assizes held in Toronto, before Galt, J., without a jury.

The plaintiffs' case was admitted.

The defendant was called for the defence. He said: I dealt with Lottridge. I got the goods mentioned. I paid \$25.75 to Lottridge on 4th September, 1874. The insolvency took place on 5th December after. I paid the Merchants' Bank \$442.39 in full of debt less the discount, on 4th January, 1875. I live in Metcalfe, Lottridge lived in Hamilton. I gave an order for the goods through an agent of Lottridge. The agent wanted me to pay for the goods. I said No, I would not pay for them until I received them. He then said he would draw on me through the Merchants' Bank. He did draw on me in accordance with that arrangement, on 17th November. I received a notice from the Bank dated 15th December. An agent of the Bank called on me on the 4th of January, and I paid \$442.39 in full, that being the amount of my indebtedness to Lottridge. I thought I was bound to pay the Bank. When I paid the Bank I deducted the discount.

*James Bancroft* said: I was manager of the Merchants' Bank at Hamilton in November last. Lottridge was a customer of that Bank. Lottridge furnished the bill for discount. It was discounted on the day it bears date, as far as I recollect. Lottridge represented to me that Mr. Sutherland would call and accept it at the Bank of Commerce, Strathroy. I discounted the draft on that representation. Lottridge stated that Sutherland owed him the money. I cannot say there the draft was sent for acceptance.

The exhibits were as follows: The bill was for \$450, and was dated at Hamilton the 17th of November, 1874. It was drawn by Lottridge at ten days after date on Sutherland at Strathroy, and was payable to Lottridge's order at the Bank of Commerce, Strathroy. The bill was endorsed

by Lottridge to the Merchants' Bank, and by that Bank for "collection on account" to the Merchants' Bank of Canada. It was never accepted by Sutherland.

The notice given to Sutherland by the Merchants' Bank was dated at Hamilton the 15th of December. It was described "*In re W. M. Lottridge & Co.,*" and it was as follows :

"DEAR SIR,—The above named, previous to their failure, discounted at this office their draft upon you for \$450. You are hereby notified to hold your indebtedness to them subject to said draft, and remit here at the earliest opportunity. Please reply notifying your acceptance."

At the foot of the notice, was a memorandum, made, probably by Sutherland, as follows : Date of invoice, 23rd October, 1874, account sent, book account only.

4 months goods.....	\$209 85
Discount.....	3 15
	<hr/>
	\$206 70
60 days goods.....	235 69
	<hr/>
	\$442 39 "

The sum last mentioned was the sum paid by Sutherland by check on the 4th of January, 1875, in full of his account.

The learned Judge was of opinion the evidence shewed the defendant had paid the Bank in his own wrong, and he entered a verdict for the plaintiff for \$445.

In this term, August 24, 1875, *J. F. Smith* obtained a rule calling on the plaintiffs to shew cause why the verdict entered should not be set aside and a verdict entered for the defendant, on leave reserved, on the ground that the bill of exchange or draft in the pleas mentioned amounted to an equitable assignment of the debt from William Lottridge to the Merchants' Bank of Canada ; and on the ground that the verdict was contrary to the evidence, as the fourth plea was fully proved.



September 3, 1875, *Snelling* shewed cause. The pleas are not correctly framed, for they state an acceptance of the bill by the defendant, but he never accepted it, unless his payment of it on the 4th of January be an acceptance. The general rule is, that a bill of exchange does not constitute an equitable assignment of any debt or claim for or in respect of which it may have been given. The bill of exchange is treated as an ordinary mercantile instrument conferring the rights which it confers and neither more nor less, unless it may be some express agreement is proved adding to or taking from it its ordinary legal effect or qualities. It is not clear that a bill of exchange can ever be or can make an equitable assignment such as is contended for by the defendant. It is insisted on by the plaintiff that it cannot. But it may not be necessary to take that ground, because in no way has the defendant proved such a case or state of facts which can be said to be an equitable assignment of the claim of Lottridge, the insolvent, on the defendant, or to have altered the ordinary mercantile character of the bill of exchange in question.

He referred to the following cases, and commented fully upon them: *Shand v. Du Buisson*, L. R. 18 Eq. 283; *Hopkinson v. Forster*, L. R. 19 Eq. 74; *Diplock v. Hammond*, 2 Sm. & G. 141; *S. C.* 5 DeG. M'N. & G. 320; *Burn v. Carvalho*, 4 M. & Cr. 690; *Thomson v. Simpson*, L. R. 9 Eq. 497, 503, over-ruled by L. R. 5 Ch. 659.

*Moss*, Q. C., supported the rule. If the pleas were proved there was a valid equitable assignment of the debt established. The facts there stated are sufficient in equity to make out such an assignment. The defendant, for the debt he owed or was to owe to Lottridge for the goods he ordered, was by express agreement with the agent who took the order for the goods to pay for them by an acceptance. The agent told the defendant that Lottridge would draw upon him through the Bank for the goods, and that was assented to, and was just what was done. The defendant then knew he would have to pay the debt to

the Bank. Lottridge could not himself have claimed the money from the defendant after he had got the discount at the Bank on the faith of that debt being answerable to the Bank for their security. And if he could not then do it, neither can the plaintiff, who stands in his place and has just what rights Lottridge had. It is disputed that a bill of exchange cannot be or constitute an equitable assignment of a debt. There is no such principle. Equity requires no particular form of instrument to transfer such a debt. It is conceded that a bill of exchange is not necessarily and in every case the assignment of a debt; but where the bill is drawn with reference to a particular debt, and the drawee is aware a bill will be drawn upon him, for it and he accepts it, or he assents to it, it is an equitable transfer of his debt to the holder of the bill: *Ex parte Imbert*, 1 DeG. & J. 152; *Jones v. Farrell*, 1 DeG. & J. 208; *Gurnell v. Gardner*, 9 Jur. N. S. 1220; *Farquhar v. City of Toronto*, 12 Grant 186; *Mandeville v. Welch*, 5 Wheat. 277, 289. In *Shand v. DuBuisson*, L. R. 18 Eq. 283, the bill was not drawn on any particular sum, but upon a general fund; and there is a difference between such a case and drawing for a particular sum which is applicable to the bill drawn. He referred also to *Re Coleman*, 36 U. C. R. 559.

September 17, 1875, WILSON, J., delivered the judgment of the Court.

An equitable assignment of a debt need not be made by deed: *Lambe v. Orton*, 1 Dr. & Sm. 125; nor need it be in writing. A verbal agreement will be sufficient: *Gurnell v. Gardner*, 9 Jur. N. S. 1220; *Tibbitts v. George*, 5 A. & E. 107.

To constitute an equitable assignment of money in the hands of a third person it is necessary there must be a particular existing fund which is dealt with, and there must be a specific appropriation of the whole or of some part of that fund: *In re Farrell*, 10 Ir. Ch. R. 304; *In re Thornton*, 13 L. T. N. S. 568; *Watson v. The Duke of Wellington*, 1 Russ. & M. 602.

In *Burn v. Carvalho*, 4 M. & Cr. 690, Lord Cottenham, said at p. 702: "In equity, an order given by a debtor to his creditor upon a third person having funds of the debtor, to pay the creditor out of such funds, is a binding equitable assignment of so much of the fund."

That is of course out of a particular fund, according to the authorities before mentioned.

And as in *Gurnell v. Gardner*, 9 Jur. N. S. 1220, where the debtor said to the creditor, the plaintiff, "There is the wool which has gone to Doncaster, go and sell that wool; pay Bradley the balance due to him on such wool, and keep the remainder yourself." The plaintiff got the wool and sold; the administrators of the debtor claimed it. Held, that was a good equitable assignment of the wool.

In *Thomson v. Simpson*, L. R. 9 Eq. 497, the plaintiffs purchased from the New Orleans Bank a bill of exchange drawn on the Bank of Liverpool upon the faith of representations made by the New Orleans Bank that they had funds in the Bank of Liverpool out of which the bill could be paid at maturity; but soon after the purchase the New Orleans Bank suspended payment (without any proceedings in bankruptcy). The Bank of Liverpool refused to accept or to pay the bill, although they had ample funds of the New Orleans Bank.

It was held by the Vice-Chancellor that where money is paid on the faith of a representation that a security for it will be paid out of a particular fund, the party who receives the money and makes the representation will not be permitted to withdraw the fund out of which the promised payment is to be made. The decision was not that an equitable assignment had been made.

That case was reversed in L. R. 5 Ch. 659.

The Lord Chancellor, Hatherley, said at p. 660, "The plaintiff's case was rested on two grounds: first that the funds in the hands of the Bank of Liverpool were held by them for the purpose of answering bills; secondly, that that was a representation made which the New Orleans Bank was bound to make good out of their funds. \* \* We are glad, so far, to



agree with the Vice-Chancellor in thinking that there clearly was no such appropriation of the funds to meet bills generally as to make each bill a specific charge on them."

In *Shand v. Du Buisson*, L. R. 18. Eq. 283, C. having a fund in the hands of B. drew a bill on B. for the exact amount of it. Held, that the bill of exchange was not an equitable assignment of the money in B.'s hands.

Bacon, V.C., said, at p. 288: "It is entirely new to me to hear that a bill of exchange in an ordinary mercantile transaction in the shape in which this appears, can amount to an equitable assignment of the debt. The note might have been endorsed to any individual, or to any number of people, who might have endorsed it in succession. A mercantile instrument it is in its origin, and in that shape it remains, and has no other vitality or effect, and to call it an assignment of a debt would be to call it not by its right name."

The facts appear to have been, that P. V. Chetty got P. S. Chetty to pay debts for him, and to reimburse him P. V. Chetty gave to P. S. Chetty a bill of exchange on Du Buisson & Clively, in whose hands P. V. Chetty's money was, for the balance of money which the drawee held for him.

In *Hopkinson v. Forster*, L. R. 19 Eq. 74, the defendant drew a check on the plaintiff in favour of one from whom he borrowed money, and he wrote to the plaintiff informing him of the fact, saying: "I wish you to put £50 to Dr. Cullen's credit as soon as possible."

The Master of the Rolls said to counsel, at p. 75, "You can have no charge in equity without an intent to charge. The letter on which you rely was not written with any intent to charge the fund; it was a mere letter of instruction to the bankers."

And in giving judgment he said, p. 76: "A check is clearly not an assignment of money in the hands of a banker; it is a bill of exchange payable at a banker's \* \*. That learned Judge, (Mr. Justice Byles) never meant to



lay down that a banker who dishonours a check is liable to a suit in equity, by the holder."

In *Ex parte Imbert*, 1 DeG. & J. 152, 3 Jur., N. S. 801, the bills drawn had certain specific funds remitted for their payment, and, of course, the appropriation of the fund could not be disputed.

In *Farquhar v. The City of Toronto*, 12 Grant 186, an order by a contractor with the city upon the Chamberlain to pay the plaintiff \$178.05, "due from me to him, on account of work done at registrar's office, on Court street," was held by the present Chancellor to be a good assignment in equity of the debt, and a bill was sustained against the defendants as the debtors in equity of the person in whose favour the order was.

That case is, perhaps, not entirely in accordance with *In re Farrell*, 10 Ir. Ch., R. 304, where the order was, "You will please hand B. £102, and charge the same to the debit of my account with you." It was there said it was a mere money order, and could have no secondary operation as an equitable agreement to charge.

There is no doubt the defendant knew he was to be drawn upon through this particular bank, the Merchants' Bank. He does not seem to have been aware of the draft, which is dated the 17th of November, having been drawn until the 15th of December, when he was informed of it by the bank; and the insolvency was on the 5th of December.

That want of notice, however, will be of no consequence if there were, in truth, an assignment, as between Lottridge and the bank.

Notice to the debtor is, perhaps, not necessary in any case, as said by the Vice-Chancellor, at p. 189, in *Farquhar v. The City of Toronto*, 12 Grant 186, unless "for the purpose of preserving priority."

The only communication between the bank and the creditor Lottridge on the subject now under consideration is, that which was stated by Mr. Bancroft, the bank manager, at the trial; "Lottridge represented to me that Mr.

Sutherland would call and accept the bill at the Bank of Commerce, Strathroy. I discounted the draft on that representation. Lottridge stated that Sutherland owed him the money."

I think, upon consideration, that upon these facts it cannot be said that Lottridge intended to charge Sutherland's debt, or that the bank required, or thought they were getting, or had got, a charge upon the money which the defendant owed.

The bill is merely an ordinary mercantile instrument, a mere money order, and can have no secondary operation as an equitable agreement to charge in and by itself—that is, from what appears on the face of it. And there is nothing outside of it which shews that Lottridge intended or desired to charge the debt itself, or ever thought of charging it, although it is quite plain he was drawing upon the defendant for the debt which the estate owed to him.

In *Diplock v. Hammond*, 5 DeG., McN. & G. 320, the order was, "I hereby authorize you to pay A. B. the sum of £ —, being the amount of my contract, he having advanced me that sum."

In *Lambe v. Orton*, 1 Dr. & Sm. 125, the letter was to pay the share to which "I am entitled," or which is "due to me," to certain persons.

In *Chowne v. Baylis*, 31 Beav. 351, the order was "Please take notice that I wish to transfer my interest in the policies" to C. D.

These were all held to be good equitable assignments. But they are very different from what appears in this case.

So *In re Thornton*, 13 L. T. N. S. 568, it is held "Where a bank makes advances upon shipments to consignees on the faith that such advances are to be paid for out of the proceeds of the goods so consigned, and the bankrupt gives an order to the bank upon such third person having the funds in his hands to pay his creditors, it is a binding equitable assignment of so much of the funds as will pay the advances made."

There is nothing here to shew that the bank discounted the bill in question on the faith that the discount was to be repaid out of that specific debt which the defendant owed to Lottridge, although the bank unquestionably discounted the bill on the faith that Lottridge was a creditor of the defendants to the amount of the bill.

I think it difficult to say, from the few words which took place between Lottridge and the bank manager, that the bank could have filed a bill against the defendant as the equitable creditors of the defendant for the debt he owed to Lottridge. And unless such a bill could have been maintained there was no equitable assignment of the debt.

If Lottridge at the time of the discount had said to the manager, "I want to draw on Sutherland for so much money he owes me, and I will guarantee that he pays you that debt," or "I will pledge that debt to you," or any thing of that kind, I am of opinion there would have been a good equitable assignment of the debt.

But in the absence of anything of the kind, and in the absence of all intent on either side to create a charge, we are of opinion we are bound to discharge the rule.

I was rather of opinion on the argument that an equity might be found to have been established; but on consideration of the facts excluding all intent between the parties so to deal, and on the good sense of the authorities, I am satisfied the rule cannot be sustained.

The rule must therefore be discharged.

There was a similar case of *Lamb v. Allen* in which a rule was also granted. That case was to abide the result of the one we have just disposed of. The rule will therefore be discharged in that also.

MORRISON, J., concurred.

*Rule discharged.*

## NATTRASS V. PHAIR.

*Chattel mortgage—Description of goods—Evidence of identity—Distress—  
Breaking open window—Action therefor.*

Goods were described in a chattel mortgage as "one kitchen table, four chairs," &c., (describing them,) "all contained in and about the dwelling-house and barn of the mortgagor, situate at or on lots," &c. : *Held*, sufficient.

The mortgage contained a proviso, that in case the mortgagor should attempt to sell or part with the possession of or to remove out of the county the goods, or any of them, the mortgagee might take possession of and sell them, and break open doors, &c., for that purpose. The mortgagee, claiming under this proviso, brought trover for the goods, which the defendant had seized under a distress for rent. It appeared that the goods were seized in October in the house mentioned in the mortgage, which had been executed in the previous August, and were of the same kind and description as those set out in the mortgage : *Held*, sufficient evidence that they were the same goods as those mortgaged.

The defendant, it appeared, in order to seize the goods under the distress, broke into the house by forcing open the window : *Quære*, as to the right of action of the plaintiff (the mortgagee) therefor. A new trial was granted, in order to ascertain the facts more fully.

APPEAL from the County Court of the County of Middlesex.

Declaration : trover for one kitchen table, four chairs, &c.

Plea : not guilty, by statute, 11 Geo. II., ch. 19, secs. 19, 20. Issue.

The evidence was as follows :—The plaintiff said : The paper produced is the chattel mortgage to me from one Luke Wright ; the value of the goods was \$61 or \$62, besides the horse, \$60 ; harness \$8, part of \$60 ; I saw the property about the 7th of August, 1873 ; Wright never paid me anything ; he took the horse away, and I do not know what he did with it ; the balance of the property was left on the premises ; the defendant told me he had sold all those articles in the house and on the premises, everything that belonged to Luke Wright ; Wright left the country ; he went to the Great Western station, and took the cars to the States ; I never saw the mare since.

On cross-examination he said : The suit commenced on the 12th of December, 1873 ; the suit is mine ; it has been delayed with the view of getting a settlement without



coming into Court; Wright got the \$100 during the previous month of that year; he went away about two months after making the mortgage; had been at his house about two or three weeks before the date of the mortgage; I saw the horse a few days after in the street; Wright was driving it; I know there was \$37 of rent due on the place; I understood that before seeing defendant, and also when I saw him; I knew when Wright went by enquiries; am not aware the horse was out of the county.

*Richard Bugler* said: I knew Luke Wright; he went away September, 1873; there was very little left; horse and harness were not there, nor the cooking stove; the house was locked; there was one large pane of glass out of the back kitchen window; I looked after the place and closed the gate; I was never in the house after he left till I gave the landlord's warrant to Phair; Crawford, Phair, and I were there then; one of us, don't know which, put our hand in through the broken windows and bent a nail down, and slid the window back; some one went in the window and opened the door; we then all went in; there was one bureau, lounge, six cane chairs, one bedstead, leaf table, one parlour stove, two common chairs; the waggon was in the barn; rent due 1st October, distress on the 4th of October; \$37.50 was the amount due, and the sale took place about six days after.

The chattel mortgage was dated the 7th of August, 1873; the consideration was \$100, the property described in it was, "One kitchen table, four chairs, one cooking stove," &c., (enumerating household furniture, democrat wagon, horse, &c., said to be "all contained in and about the dwelling-house and barn of the said Luke Wright, situate at or on lots 35, 36, 37, and part of lot 34, on the east side of Colborne street, and on lots 35, 36, 37, and part of lot 34, on the west side of Maitland street, in the said city of London, county of Middlesex, and province of Ontario." The proviso was for payment of the \$100, at ten per cent., on the 13th of December thereafter; and it was also provided, "that in case default shall be made

in payment of the said sum of money, \* \* or the interest thereon or any part thereof, or in case the said party of the first part shall attempt to sell or dispose of, or in any wise part with the possession of the said goods and chattels, or any of them, or to remove the same or any part thereof out of the county of Middlesex, without the consent of the party of the second part first had in writing," then the party of the second part, wherever the goods may be, may break open doors, &c., for the purpose of taking possession of and removing the same, and to sell the same, &c.

The defendant's counsel moved for a nonsuit, because:—

1. The money was not due by the mortgage till the 13th of December, 1873, and till that day the plaintiff was not entitled to recover.

2. The property taken by the defendant was sold to pay rent which the plaintiff knew was due upon the premises where the goods were.

3. There was no proof of the conversion of the goods in the mortgage by the defendant. The property was not identified.

4. There was no sufficient description of the property in the chattel mortgage.

5. There was no evidence of the chattel mortgage being duly registered.

The learned Deputy Judge nonsuited the plaintiff on the first four grounds taken, and overruled the fifth.

The plaintiff's counsel in the following term of the Court moved for a rule on the defendant to shew cause why the nonsuit should not be set aside, and a new trial granted, on the following grounds:—

1. That the plaintiff was entitled to immediate possession of the goods by virtue of the mortgage, and the sale or disposal of the mortgaged property.

2. That the entry of the house by the defendant by two others assisting him in making such distress by way of a window, which was broken open, renders the distress illegal, as the defendant is a trespasser *ab initio*.

3. That the sale of the property by the defendant was sufficient evidence of a conversion by him.

4. That the property mortgaged was identified with the property sold by being in the same house.

5. That the property mortgaged is sufficiently described in the mortgage.

The learned Deputy Judge refused the rule. His judgment is as follows:—"I will have to refuse the rule, upon the grounds that there was no evidence or no sufficient evidence of the property in the mortgage having been dealt with in such a way as to entitle the plaintiff to possession of the goods named in the mortgage before the time that the mortgage fell due, and the action was commenced before that time: that the evidence went to shew that the landlord was entitled to the possession of the goods for the rent then due, of which the plaintiff had full knowledge: that in any event, there was no sufficient identification of the goods sold as being the same, or any part thereof, as described in the mortgage; and there was no proof of conversion of the goods described in the mortgage."

The reasons for appeal were those which have just been mentioned as the grounds of motion for a rule to set aside the nonsuit.

August 27, 1875, *Bartram* for the appellant. The mortgage debt was due to the plaintiff, the mortgagee, at the time the distress was made, because the condition was broken by the mortgagor, and there was evidence he had attempted to dispose of, or that he had in some way parted with the possession of the goods, or of some of them, or to remove the same, or some part thereof, out of the county, without the consent of the plaintiff in writing or otherwise. The horse had plainly been parted with by the mortgagor. It was taken away by him, but where to could not be discovered, and he absconded to the United States. The sale of the property was clearly a conversion, if the plaintiff were entitled to the immediate possession of the goods before and at the time of the distress, and if the

distress were illegal from the beginning, and the defendant a trespasser and wrong-doer. The property was sufficiently described in the mortgage. It was a conveyance of "all and singular the goods, chattels, furniture, and household stuff, hereinafter more particularly mentioned and expressed, that is to say, one kitchen table," &c., describing the articles separately, and as being "all contained in and about the dwelling-house and barn of the said Luke Wright, situate," &c., which is a sufficient description, according to the decisions in our Courts. And the property which was taken by the defendant was sufficiently identified with that described in the mortgage, because the goods were found in the same dwelling-house mentioned in the mortgage, and only a few weeks after the making of the mortgage. The other question is, whether the entry by the defendant and by the landlord he represented into the house of the mortgagee, of which it is said he was the tenant at a rent, part of which was overdue at the time of the taking, and which entry was by an act of trespass in forcing and raising the window, the house being otherwise securely fastened, made the defendant and the landlord trespassers *ab initio*, and so made void the distress which was made. It was said the defendant was a trespasser as against Luke Wright, the tenant, whose house as such tenant was broken into, but that he was not a trespasser as against the plaintiff, the mortgagee, even although it is admitted it was his goods that were taken. There is no such distinction. It is laid down clearly that the distress is void *ab initio* in such a case, and all parties concerned in the entry and taking of the goods are trespassers: *Woodfall*, L. & T., 10th ed., 768; *May v. Severs*, 24 C. P. 396; *England v. Cowley*, L. R. 8 Ex. 126; *Miles v. Furber*, L. R. 8 Q. B. 77.

*Hector Cameron*, Q. C., contra. The distress was not void *ab initio*, although it may be the defendant was a trespasser. *Semayne's case*, 5 Rep. 91, shews that under an execution, if the sheriff break the house of the debtor to take the goods, the seizure so made is good in law, although he is a trespasser for the violent entry. It was understood here



that the term had expired when the landlord entered to distrain, so that he was entering on his own possession and into his own property. There is no evidence whatever to shew the term was in existence at the time of the entry, and if the plaintiff desired to shew the defendant was a trespasser it was absolutely necessary he should have proved that fact. The plaintiff was not, at the time of the seizure of the goods, entitled to the possession of them, because the day of payment of the debt had not arrived, and there was no proof of the mortgagor having broken the condition by any removal, sale, or disposal of the goods. The barn where the buggy or waggon was was not broken open by the defendant: *Ryan v. Shilcock*, 7 Ex. 72.

September 17, 1875. WILSON, J.—We are of opinion the goods are sufficiently described in the mortgage, according to the authorities; and that there was abundant evidence of the goods in the mortgage mentioned being the same as those which were in the house at the time of the seizure. The goods were in the same house which is described in the mortgage. The goods are of the like kind and description also; and the seizure was made on the 4th of October, while the mortgage was made on the 7th of August before it, and it is very improbable that the goods were changed, or that all of them were changed during these few weeks. The case should have gone to the jury, certainly.

There was clear evidence, we think, that the mortgagor had “parted with the possession of the horse” before the seizure, in which case, by the terms of the mortgage, the plaintiff became entitled to enter into or to break into, if necessary, the house of the mortgagor and take the goods, and sell them and pay himself his claim.

There was plain evidence of a conversion of the plaintiff's goods if, as already mentioned, he was entitled to them by reason of his debtor having parted with the possession of the horse.

There is no evidence that the plaintiff ever entered into the house or took the goods. At the most, he asserted the right to have them and own them. He certainly had the legal title to them relieved from any power of the mortgagor to detain them if the mortgagor had forfeited his right to their longer possession, of which, as we have said, there was evidence.

Assuming, then, the goods were the property of the plaintiff at the time of the seizure, has he a right to complain of the defendant's act in breaking into the house by forcing and opening the window?

The defendant raises a preliminary question to that. He says the lease was at an end at the time of the seizure, and as the plaintiff is founding his claim in this action only upon the fact of the taking having been effected by means of a trespass by the defendant, he must prove that trespass. He must prove not only that the house was broken, but that the house was the house of the mortgagor, and that he did not shew it, because he did not shew the lease was still a continuing lease.

If the person who was once shewn to have been a tenant were still in possession, it might be presumed the tenancy was continuing until the contrary was shewn. But here the tenant was not in, but had abandoned possession, and I am of opinion there can be no such presumption in that case. It was, therefore, the place of the plaintiff to have proved the continuance of the lease. That he did not do. If the house were not the property of the mortgagor as tenant, it was the property of his landlord, and he was one of the persons who, it is said, broke into the house.

The question which was chiefly discussed here was whether, if the house were still the house of the tenant, or perhaps I should say, were not the house of the person who distrained as landlord, the breaking of the house to make a distress, and distraining on the goods therein, made the seizure void *ab initio*, and gave to the plaintiff, as owner of the goods taken, a right of action for such taking, although the rent was in arrear, and although the tenant

or debtor made no complaint of the trespass to the realty?

I am disposed to think that if the person distrained on were still a tenant at the time of the breaking and seizure, and he gave a license to break the outer door to distrain, that it would be a good justification against every one for the breaking, as well as for the seizure of the goods by such breaking. Or if the tenant lent his horse to another to ride upon, and the landlord distrained the horse while so in actual use, perhaps both the tenant, as the owner of the horse, and the person whose temporary use of it was interfered with, could complain, the one being deprived of the use of the horse, and the other for the wrongful taking of the property while it was in actual use.

But in such a case I also think that the license of the person riding the horse, given to the landlord to make the distress, would prevent the tenant from complaining of the seizure, as much so as if the person so using it had voluntarily given up the use of it on the request of the landlord.

If the tenant were to remove his goods to the house of another to avoid a distress, and the landlord broke into that house and seized the tenant's goods, would the license of the owner of the house to break it prevent the tenant from complaining of the seizure of the goods? I think it would. And if there were no such license, I am of opinion that both the owner of the house and the tenant could complain, the one of the breaking of the realty, the other of the taking of the goods.

Where the goods are all along liable to seizure, and are goods which can be seized, they are when they are secured in a closed house, or are in use, under a temporary privilege. In the one case by the closed house, in the other by the actual user.

And if the house be allowed to be opened, or if the person actually using the article abandon its use, there is, I think, no longer a protection to such property, and it may be taken as a distress.

A seizure, after sunset, of the goods of another on the

premises of the tenant for rent, I should say, can not be authorized by the tenant, for the goods are then protected, and the tenant cannot forego that privileged time to the prejudice of another, for he cannot make a time which is in fact after sunset a time before it. The actual existing period of privilege overshadows the goods, notwithstanding anything the tenant can say or do, so far as third persons are concerned. So, after a distress voluntarily abandoned by the landlord, the tenant, I think, cannot allow another distress to be made to the injury of third persons. See *Bagge v. Mawby*, 8 Ex. 641.

In *Semayne's case*, 5 Rep. 91, it is said the breaking of an outer door by the sheriff under a *fi. fa.* against the goods within it, is an act of trespass by the sheriff "by the breaking, and yet the execution which he then doth in the house is good." That rule does not apply to a distress for rent, for in such a case the breaking of the house and the seizure of the goods is each a trespass: *Attack v. Bramwell*, 3 B. & S. 520.

Although Mr. Baron Parke, in *Ryan v. Shilcock*, 7 Ex. 72, 74, speaks of distresses as perhaps being on the same footing with executions, there is a difference, in many respects, between executions and distresses for rent: *Brown v. Glenn*, 16 Q. B. 254; *Hooper v. Lane*, 3 Jur. N. S. 1026, 1045. It may also have some application that goods are bound from the delivery of the writ to the sheriff, while under a distress they are bound only from the seizure: *Samuel v. Duke*, 3 M. & W. 622. See also the C. L. P. Act, sec. 266. Goods at a tradesman's, belonging to another, to have work done on them, are privileged, and the tradesman cannot waive that privilege to the injury of the owner of the goods. The privilege in such a case is that of the owner of the goods.

In this case there was no license of the tenant (if he were in fact tenant at the time) proved to the breaking of the house. In the absence of that I rather think it is better to hold that the seizure of the goods, effected by the



breaking of the house, is continued so long as that breaking has not been authorized or cannot be justified.

That is the principle of the decision in *Attack v. Bramwell*, 3 B. & S. 520.

I thought, on the argument, that the mortgagee had nothing to do with the breaking of the house, and I think so still. But I think he may shew his goods have been taken by an act of trespass, and if he can prove that, then under a warrant of distress they have been wrongly taken.

There are some cases in which a wrong may be done to one, and another has no right to claim anything for it.

As if a vendee take goods from a carrier without his leave before they have got to their destination, that may be a wrong to the carrier, but it will not enable the unpaid vendor to stop the goods as *in transitu* after the vendee has so got possession of them: *Whitehead v. Anderson*, 9 M. & W. 518, per Parke, B., at p. 534.

I think the case must go to another trial to get the facts more fully ascertained.

The appeal will be allowed, and the rule below will be made absolute for a new trial without costs.

MORRISON, J., concurred.

*Appeal allowed, without costs.*

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## MASON ET AL. V. THE GRAND TRUNK RAILWAY COMPANY.

*R. W. Co.—Contract to carry—Conditions—Notice of claim—Liability.*

Defendants on the 5th of October, 1874, received goods at Montreal for the plaintiffs, addressed to the plaintiffs at Peterborough, "By the Grand Trunk Railway Company to Port Hope, thence by the Midland Railway." One of the conditions on which the defendants received the goods was, that no claim for damages to, loss of, or detention of goods, should be allowed "unless notice in writing, and the particulars of the claim for said loss, damage, or detention, are given to the station freight agent at the place of delivery within thirty-six hours after the goods in respect of which the said claim is made, are delivered."

The goods got to Port Hope on the 8th of October, but by some mistake one case was not given by the defendants to the Midland Railway till the 9th of November, and the plaintiffs were advised of its arrival at Peterborough on the 11th. On the 12th the plaintiffs wrote to the defendants' agent at Montreal, and to the station agent of the Midland Railway at Peterborough, that they had been advised of its arrival, but that they refused to accept it, because the delay had been most unreasonable, they had suffered loss through the detention, and had been compelled to re-order goods; and they required the defendants to compensate them for the loss sustained, and the value of the package.

*Held*, that these letters were not a compliance with the condition.

*Held*, also, that the "place of delivery," mentioned in the condition above stated, was Peterborough, the place of delivery to the plaintiffs, not Port Hope, where the goods were to be delivered to the Midland Railway; and that such notice should be given to the station freight agent at Peterborough, who would be the person agreed upon to receive it.

*Held*, also, that such notice was required, though the place of delivery was off the defendants' line.

*Held*, also, that the defendants were under no obligation to give notice of the delivery of the goods by them to the Midland Railway.

Another condition was, that goods addressed to places beyond the defendants' line, and respecting which no direction to the contrary should have been received, would be forwarded by the defendants as opportunity might offer, by public carriers or otherwise, or might be suffered to remain in the defendants' warehouse, at the risk of the owner; but that the delivery by the defendants should be considered complete, and their responsibility cease, when the other carriers should have received notice that the defendants were prepared to deliver the goods to them; and that the defendants would not be responsible for any loss or detention after arrival at their station nearest the place of consignment. The third count alleged that the goods were delivered to the defendants to be carried from Montreal to Peterborough, subject to this condition (setting it out), amongst others, and averred that the defendants did not forward the goods to Peterborough within a reasonable time, but on the contrary detained them at Port Hope in their warehouse. *Held*, that defendants were charged as carriers, and were so acting, not as warehousemen.

APPEAL from the County Court of the county of Peterborough.

The first count stated a contract to carry goods from Montreal to Port Hope, and there to be delivered for the plaintiffs to the Midland Railway of Canada, for carriage to Peterborough; and that the defendants neglected to carry within a reasonable time, whereby the plaintiffs were deprived of the use of the goods for a long time, and the same were diminished in value.

The second count stated the contract to carry from Montreal to Peterborough, with the like breach and damage.

Third count: that the defendants owned a railway running from Montreal to Port Hope, used for the carriage of goods and passengers, and certain warehouses along the line; and the plaintiffs delivered to the defendants certain goods to carry from Montreal to Peterborough—that is, to carry from Montreal to Port Hope, the station nearest to Peterborough, and to be delivered within a reasonable time by the defendants' railway, and thence by the Midland Railway of Canada to Peterborough—and there within a reasonable time delivered to the plaintiff for reward, subject to certain conditions, some of which were: "That all goods addressed to consignees at points beyond the places at which the company have stations, and respecting which no direction to the contrary shall have been received at these stations, will be forwarded to their destination by public carriers or otherwise, as opportunity may offer, without any claim for delay against the company for want of opportunity to forward them; or they may, at the discretion of the company, be suffered to remain at the company's premises, or be placed in shed or warehouse, (if there be such conveniences for receiving the same), pending communication with the consignees, at the risk of the owners as to damages thereto from any cause whatsoever; but the delivery of the goods by the company will be considered complete, and all responsibility of the said company shall cease, when such other carriers shall have received notice that the said company is prepared to deliver to them the said goods for further conveyance. And it is expressly declared and agreed that the said Grand

Trunk Railway Company shall not be responsible for any loss, damage, or detention, that may happen to goods so sent by them, if such loss or detention occur after the said goods arrive at said station or place on their line nearest to the points or places which they are consigned to, or beyond the said limits." And the plaintiffs averred that the defendants did not within a reasonable time forward the said goods from Montreal to Peterborough, and did not within a reasonable time deliver the same to the plaintiffs at Peterborough; the same being the place of destination of the said goods, but on the contrary, after the arrival of the goods at Port Hope, the station of the defendants nearest to Peterborough, the defendants stored the goods in their warehouse at Port Hope, and for a long and unreasonable time after such arrival at Port Hope detained and kept the same in their warehouse and premises at Port Hope, and refused to deliver them to the Midland Railway of Canada for further carriage to Peterborough to the plaintiffs, who were ready and willing to pay all their charges and claims upon the same, and demanded the same from them; and for a long and unreasonable time after the arrival of the goods at Port Hope, the defendants neglected and refused to inform the Midland Railway of Canada of their arrival, although often requested so to do, but concealed from the said railway company, and from the plaintiffs, the fact of such arrival, and misrepresented and stated to the plaintiffs that the same had not yet reached Port Hope, and thereby prevented the Midland Railway of Canada from demanding and receiving the said goods—by reason of which the plaintiffs for a long time were deprived of the use and possession of the goods, and the same were diminished in value, and the plaintiffs were put to great loss and inconvenience.

Pleas, 1, to first count—that defendants did not promise as alleged.

2. To same count—that the plaintiffs did not deliver the goods to the defendants, nor did the defendants accept or receive the same from the plaintiffs on the terms and conditions, or in the manner and form alleged.



3. To same count—that the goods were delivered by the plaintiffs to the defendants, and were accepted and received by the defendants upon and subject to the terms of a special contract between the parties respecting the care and carriage of the goods, and not otherwise; and that one of the conditions of the contract on which the goods were received and carried was, and is: “That no claim for damage to, loss of, or detention of, any goods for which this company is accountable, shall be allowed unless notice in writing, and the particulars of the claim for said loss, damage or detention, are given to the station freight agent at the place of delivery within thirty-six hours after the goods in respect of which said claim is made are delivered.” And the defendants say they safely carried the goods from Montreal to Port Hope, and there delivered the same to the Midland Railway of Canada, of which the plaintiffs had notice; and the plaintiffs did not give to the defendants’ station freight agent at the place of delivery notice in writing of the said loss or damage, in the first count mentioned, and the particulars of the said claim for said loss, damage, or detention, within thirty-six hours after the goods were delivered, as in the plea mentioned, which are the causes of action in the first count mentioned.

4. To second count—that defendants did not promise as alleged in said count.

5. To same count—the like as second plea to first count.

6. To same count—the like as third plea to first count.

Pleas to third or added count—1. Not guilty.

2. The same as second plea to first count.

3. That the goods were delivered to the defendants by the plaintiffs, and were by the defendants had and received for carriage, upon the special contract in the said count mentioned; and that said special contract is and was subject to other conditions than those in the said count mentioned, and one of which was, and is, that the defendants should not in any case or under any circumstances, be liable for the loss of the market of the goods: that the defendants did safely and securely carry the goods

to Port Hope, and there did safely and in good condition, deliver the same to the Midland Railway, who delivered the same in like condition to the plaintiffs at Peterborough; and that the claim made by the plaintiffs in the third count is for loss of market by reason of detention of the goods, which are the causes of action in the said count mentioned.

4. The same as the third plea to first count, but alleging that the plaintiffs had notice of the delivery by the defendants of the goods to the Midland Railway.

Replication.—Issue upon all the pleas.

2. To fourth plea to third count: that the plaintiff had not notice of the delivery of the goods to the Midland Railway as alleged.

3. To same plea: that the plaintiffs did give to the agent of the Midland Railway at Peterborough notice in writing with particulars of their claim, in the third count mentioned, within thirty-six hours after delivery of the goods. Issue.

At the trial, Mr. *Hickie*, the defendants' station agent at Port Hope, produced the shipping bill and the defendants' receipt for the goods, both dated at Montreal on the 5th October, 1874. He said they shew ten packages were delivered to and received by defendants for the plaintiffs, addressed to "M. & B., Peterborough—G. T. R., Port Hope, thence M. R. R." Condition 10 on the shipping bill and receipt is the same as it is set out in the third count, and condition 12 is the same as it is set out in the third plea to the first count. On receipt of the ten pieces on the 8th October, I communicated with Montreal to say that the way bill that came with the goods was for nine cases, and ten had come. I communicated with Montreal for a debit of this case, and did not receive the debit till 22nd October.

The witness then said something, not plainly taken down, of a case having been given to the Midland Railway, between the 8th and 22nd October, as and for the case in question, but it was not the one communicated

about. The case in question was given by the defendants, agent at Port Hope to the Midland Railway for the plaintiffs, on the 9th of November.

A letter of plaintiffs of the 12th November, 1874 to Mr. Hickson, the secretary of the defendants at Montreal, was proved, in which, among other things they say : " We were yesterday advised by the agent of the Midland here, that the case of goods referred to had arrived, but we declined to receive it. \* \* We refuse to accept the goods, first on account of unreasonable delay ; second, we have suffered loss through detention ; and, third, have been compelled to re-order goods in consequence. We will accept the goods now, only on condition that the G. T. R. Co. compensate us for damage or loss sustained because of their neglect to forward along with balance of goods included in same shipping bill."

Mr. *Stevenson*, the freight agent at Montreal of the defendants, wrote on the 27th November to the plaintiffs : " If you will be good enough to receive the case and make out an account of your loss, it shall have my immediate attention."

On the 12th of November, the plaintiffs also wrote to Mr. Gladman, the station agent of the Midland Railway at Peterborough, saying they had received that company's advice yesterday, of the case at Peterborough for them, " and as the delay has been most unreasonable, and we have suffered loss through detention, and have been also compelled to re-order goods in consequence, we must, therefore, decline to receive the case, and will hold the railway accountable for such detention, and the value of its contents of this package of goods."

The case arrived at Peterborough, and the Midland railway advised the plaintiffs of it on the same day.

The plaintiff *Mason* said the depreciation of value of goods in the case was \$35.50, and they could not be sold till the next fall.

On the 30th of November, the plaintiffs wrote to Mr. Stevenson in answer to his letter of the 27th of that

month. They say: "We have concluded to accept the goods now lying at the Midland station here, on the payment of \$125, as recompense for loss and damage sustained from the cause complained of. This offer must be understood to be made without prejudice."

On the 7th December, Mr. Stevenson answered, the percentage was so very large he would like to know on what basis of loss it was made up.

On the 9th December, plaintiffs answered, they have not yet got goods; that they will not take less than \$125, and they had already given the particulars on which they based their claim to compensation for loss. On the 14th December, Mr. Bell, for the defendants, wrote to the plaintiff they were bound to take their goods, and they might do so, retaining any claim they had on the defendants for loss for detention; and he asks what their claim was, and if it were reasonable it would be paid.

The plaintiffs sent no statement in answer. Mr. Mason said: "Would have sold most of the goods, if we had had them on the 12th November, last fall."

Several objections were taken by the defendants' counsel to the plaintiffs' case; and leave was reserved to the defendants to move to enter a nonsuit or verdict on the whole case. The charge to the jury was, what was the depreciation on the goods, in consequence of the delay to the 11th of November; and if the Court, in term time, should be of opinion the plaintiffs were entitled to interest or profits, the verdict, if any, might be increased accordingly.

The jury found a verdict for the plaintiffs and \$10 damages.

The defendants afterwards obtained a rule calling on the plaintiffs to shew cause why the verdict should not be set aside, and a verdict entered for the defendants, on the leave reserved.

The learned Judge made the rule absolute, stating the reason in his judgment, as follows: "For a fourth plea to the added count, the defendants set up the twelfth condition endorsed on the receipt and shipping note, and they



aver that the notice with particulars required was not given. The plaintiffs join issue on the plea, and reply that they gave the agent of the Midland Railway at Peterborough the notice in writing and particulars within thirty-six hours after the delivery of the goods, on which issue is joined. At the trial, the only evidence in support of the issue raised by the plaintiffs on the fourth plea, was a letter by them to Mr. Gladman, station agent, Midland Railway, Peterborough. It, however, does not contain the particulars of the claim for loss, damage, or detention required by that condition. The correspondence filed at the trial shews that for more than a month after the date of the letter to Mr. Gladman, the defendants urgently requested the plaintiffs to give them the particulars of their loss, that a reasonable arrangement might be affected, and that the plaintiffs failed to furnish the required particulars. *Hamilton v. The Grand Trunk R. W. Co.*, 23 U.C. R. 600, and *Spettigue v. Great Western R. W. Co.*, 15 C.P. 315, are authorities to the effect that the conditions endorsed on the receipt and shipping note given by the defendants constitute a special contract exempting the defendants from liability for loss sustained, even although caused by gross negligence, and these cases make an end of the matter, and shew that the defendants in law are not liable for the damages sought. On the argument of the rule the learned counsel for the plaintiffs relied on *Gordon v. Great Western R. W. Co.*, 34 U. C. R. 224; *Hall v. Grand Trunk R. W. Co.*, *Ib.*, 517, and other cases cited by him, but they do not help the plaintiffs in this suit. The rule will be made absolute as to entering a verdict for the defendants."

The plaintiffs appealed, on the following grounds:

1. The second count of the declaration was proved by the evidence, the contract being to carry goods from Montreal to Peterborough, and not to Port Hope, as ruled by the learned Judge of the County Court.

2. The added count was proved, and the defendants were not at liberty to raise, as an answer to that count, the conditions endorsed on the way-bill, which only limited their liability as carriers, and not as warehousemen.

The letter of plaintiffs, dated 12th of November, to Gladman, the station freight agent of the Midland Railway at Peterborough, the place of delivery, together with the plaintiffs' letters to Hickson, was a compliance with the conditions or contract requiring notice and particulars of claim to be delivered within thirty-six hours after the delivery of the goods.

4. The ruling of the learned Judge was contrary to law and evidence.

August 31, 1875. *Harrison*, Q.C., argued the case for the appellants. The goods were sent from Montreal on the 5th of October, got to Port Hope on the 8th, and they were not given by the defendants to the Midland Railway till the 9th of November, and they reached Peterborough on the 11th of November. The plaintiffs made repeated enquiries for them at Port Hope and at Montreal, and could get no account of them till the 11th of November, when they were advised by the Midland Railway that the goods had arrived at Peterborough on the 11th of November. The delay arose purely from some mistake or neglect of the defendants. On the 12th of November the plaintiffs wrote to Mr. Gladman, the agent of the Midland Railway, and to Mr. Hickson, the secretary of the defendants at Montreal, refusing to receive the goods, and giving the reason for so doing, and stating the nature and particulars of their claim and loss. The contract is that which is contained in the second count, to carry from Montreal to Peterborough. But the true claim of the plaintiffs arises upon the third count, in which the defendants are treated as warehousemen. That count is according to the form in *McCrosson v. Grand Trunk R. W. Co.*, 23 C. P. 107. The only question considered by the learned Judge in the Court below was, whether the defendants were protected by the 12th condition, before referred to, requiring the notice of claim to be given in within thirty-six hours after the delivery of the goods. That condition has no application whatever to the third count. The condition

refers only to the defendants' duty as carriers, while the third count is a charge against them as warehousemen: *Northern R. W. Co. v. Fitchburg R. W. Co.*, 6 Allen 254. Nor has the condition any application to goods which are to be delivered by the defendants at a point beyond their own line of railway. Nor were the plaintiffs bound to notify the defendants' agent at Port Hope, for that was not the place of delivery to the plaintiffs; nor to notify the agent of the Midland Railway at Peterborough, for he was not the agent of the defendants. But if the notice apply in such a case, the plaintiffs contend they gave it to both companies, by their letters of the 12th of November, which day was within the thirty-six hours limited by the condition. The rule below should have been discharged in place of being made absolute, and the appeal should be allowed.

*M. C. Cameron, Q.C.*, contra. The third count does not charge the defendants as warehousemen but as carriers. The notice should have been given according to the 12th condition, and it was not given—that is, a notice of the claim for damages to, loss of, or detention of the goods, and the particulars of the claim for such loss, damage, or detention was not given. The letters of the 12th of November are not such a notice as was required to be given.

September 17, 1875. WILSON, J.—I shall first consider whether the terms of the 12th condition, which is set out in the third plea to the first count, have been complied with by the plaintiffs. If it has not been complied with, that ground of defence will be an answer to the second count, on which the plaintiffs rely, and to the third count also in certain events.

The defendants will succeed on it if the allegation of notice to the plaintiffs of the delivery of the goods to the Midland Railway, alleged in the plea, were proved or if its proof be immaterial, and if the condition apply, although the place of delivery were off the defendants' line, and whether the defendants were carriers or warehousemen.

The 12th condition is stated above. The first question is, was there a notice in writing of a claim for damages to, loss of, or detention of the goods, and the particulars of such claim, given by the plaintiffs to the station freight agent at the place of delivery, within thirty-six hours after the goods were delivered? The answer to that question depends partly upon the two letters of the plaintiffs to Mr. Gladman and to Mr. Hickson of the 12th of November.

The letter to Mr. Gladman states that "as the delay has been most unreasonable, and we have suffered loss through detention, and have also been compelled to re-order goods in consequence, we must therefore decline to receive this case, and will hold the railway accountable for such detention, and the value of its contents of this package of goods."

The letter to Mr. Hickson is to the same effect, and very nearly in the same words. Stating the facts that there has been unreasonable delay and loss from detention, is not a notice of the *particulars* of the claim for damages, loss or detention, and the fact that the plaintiffs had been obliged to re-order goods in consequence of the detention, affords no *particulars* of their claim. The plaintiffs say they will hold the defendants liable for the detention, and for the value of the contents of the package. But for what amount detention money is claimed, or what the value of the contents of the case is, they have not stated.

In proving a case before the Court or jury the plaintiffs would have to shew in what way and to what extent the detention had caused damage—as that the season for sale had gone by, or that the goods had got mildewed or been injured by rats or otherwise, and that the whole or a certain portion of the goods was so injured, and the damage was so much in money.

That the plaintiffs have not done. The cases under insurance law, on which the like question has arisen, whether a sufficient notice in writing of the particulars had been furnished by the insured, will be applicable here.

I am of opinion the notices given are not in terms a compliance with the terms of the 12th condition.



Then as to the averment in the defendants' fourth plea to the third count, that the plaintiffs had notice of the delivery of the goods by the defendants to the Midland Railway, and which averment the plaintiffs have traversed. I am of opinion the fact of notice was and is in no way material. The defendants were under no obligation by the conditions to give such notice.

There was a notice required to be given by the plaintiffs under the 12th condition, where, as in this case, the place of final delivery to the plaintiffs was to be not upon the defendants' line of railway, but at a place off it and beyond it. The condition does not speak of the place of final delivery, nor of delivery to the owner or consignee, but simply at the place of delivery after the goods are delivered : that is, no claim for damages shall be allowed unless notice in writing be given of it "to the station freight agent at the place of delivery within thirty-six hours after the goods, in respect of which said claim is made, are delivered."

What place of delivery is here referred to? Is it the place of delivery by the defendants at Port Hope to the Midland Railway, or the place of delivery at Peterborough to the plaintiffs?

It seems reasonable to hold that it is the place of delivery to the plaintiffs, for otherwise the owner or consignee might not know of the delivery by the Railway Company to a different carrier, and if he did, he might not know whether there was damage done or not until the packages were opened, which he could not do, and would not, in case of bonded goods, be allowed to do, until he got them into his own possession.

I think the contract was to carry from Montreal to Peterborough. The defendants received the goods addressed to "M. & B., Peterborough, G. T. R., Port Hope, thence M. R. R." That is, the defendants were to send the goods by their own line to Port Hope, and by the Midland Railway from there to Peterborough : *Webber v. Great Western R. W. Co.*, 3 H. & C. 771.

And I am of opinion that their contract being to carry

to Peterborough, that the notice required by the 12th condition should have been given, as one was, to the station freight agent at that place, who would for that purpose be the agents of the defendants, or at any rate the person agreed upon between the parties to receive it : *Scothorn v. South Staffordshire R. W. Co.*, 8 Ex. 341.

The condition does not dispense with notice because the goods are to be carried to and delivered at a place off the defendants' line. The defendants were still entitled to notice.

The plaintiffs, however, will be entitled to succeed if the condition apply to the defendants only as carriers, and not to them as warehousemen, and if the third count charge the defendants in their character as warehousemen.

The carriage was not completed when the goods were at Port Hope, and it does not follow that the landing of the goods at Port Hope was a termination of the duty of the defendants as carriers : *Bourne v. Gatcliffe*, 3 M. & G. 643 ; *Giles v. Taff Vale R. W. Co.*, 2 E. & B. 822.

The defendants had the right to put the goods in a shed or warehouse, if they pleased, in cases "respecting which no direction to the contrary shall have been received;" but that did not apply here, for the defendants had instructions, and had agreed to forward from Port Hope by the Midland Railway, and they would have been liable if they had not forwarded in that manner. I am rather disposed to think that the defendants, under the circumstances, were at the risk of common carriers during the whole time they had the goods for the plaintiffs under the contract between them, and that they were never properly warehousemen, with a very much smaller liability than that of common carriers.

But does the third count charge them as warehousemen ? It alleges that the goods were delivered to the defendants to be carried from Montreal to Peterborough, and there, within a reasonable time, to be delivered to the plaintiffs for reward, subject to certain conditions ; and it avers that the defendants did not, within a reasonable time, forward

the goods from Montreal to Peterborough, and within a reasonable time deliver them to the plaintiffs at Peterborough, but on the contrary detained the same at Port Hope, on their arrival there, in their warehouse, &c.

That seems to me to be a count for not carrying and delivering the goods within a reasonable time, *but, on the contrary*, doing something else with them, namely, warehousing them at Port Hope. The words, "*but, on the contrary*," qualify the previous statement by shewing how and why it was the goods were not carried and delivered within a reasonable time from Montreal to Peterborough.

It differs from the case of *McCrosson v. Grand Trunk R. W. Co.*, 23 C. P. 107, to which we were referred, because it appeared there the *transitus* was completely at an end.

I am of opinion the defendants were throughout acting as, and have been sued only as common carriers, and in that case it is not denied by the plaintiffs that they were entitled to notice if the condition applied to a carriage of goods beyond the limits of their own line; and, as I have just stated, I think they are.

In any way of viewing the case, I think the defendants were entitled to the notice required by the 12th condition, and as that has not been properly given the defendants are entitled to succeed. I do think, however, it is a very hard case upon the plaintiffs, who were certainly damaged to some extent, although by no means to the extent of \$125, which was the lowest sum they would arrange their claim for.

Their own evidence was, the actual depreciation was \$35, and that they would have sold most of the goods if they had got them on the 12th of November.

They therefore plainly asked too much by way of compensation, and it was certainly their own fault they did not get the goods on the 12th of November, for they expressly refused to take them.

If the plaintiffs had been more reasonable in their

demand, it is very probable the defendants would have settled it with them.

We are obliged to dismiss the appeal, without costs.

MORRISON J. concurred.

*Appeal dismissed, without costs.*

PRESTON V. HUNTON.

*Insolvent Act of 1869—Composition and discharge—Partnership and separate creditors—Proof of claim as surety—Mention of claim in statement—Pleading.*

Declaration: for money paid by the plaintiff for T. H. and F. H.

Fifth plea, in substance, that T. H. and F. H., being co-partners in trade, on the 5th March, 1873, made an assignment in insolvency: that on the 17th a deed of composition and discharge was executed by the proper number and value of their creditors on certain terms, which were duly carried out by the insolvents: that there were no separate creditors of either of the insolvents: that the deed was duly confirmed by the Judge: that two notes became due in December, 1872, made by the plaintiff for the insolvents' accommodation, and were dishonoured, and were then and up to the payment of the composition held by the Bank of British North America: that the liability of the insolvents to the bank was set out in the statement of their affairs at the first meeting of creditors, in which these notes were stated to have been made by the plaintiff for their accommodation: that the bank after the assignment delivered to the assignee their claim against the insolvents, and proved for the full amount of the two notes, and were creditors until they received the notes for the composition agreed upon: that they executed the deed and received the composition: and after they had proved their claim the plaintiff, as surety for payment of the notes, was obliged to pay to the bank the amount of the notes, less the composition received by the bank; and part of the plaintiff's claim herein pleaded to is for the said money so paid by him to the bank.

The sixth plea was the same as the fifth down to the last averment—of payment by the plaintiff to the bank—which was omitted: and it was alleged that it was agreed between the plaintiff and the bank, in respect of the same two notes, that the plaintiff should pay the bank one half of them, and that the bank, in order to realize the other half, should proceed against the insolvent estate for the whole: that the plaintiff accordingly paid one-half of said notes to the bank, and the bank proved for and received the composition upon the whole, and the money so paid by the plaintiff to the bank is part of the claim sued for and now pleaded to.

The seventh plea was to different sums from those already pleaded to. It followed the fifth plea down to and including the averment of the



confirmation of the composition and discharge; and then alleged that the plaintiff had notice and knowledge of all said facts and of those hereinafter mentioned: that a note for \$750 made by the plaintiff to and endorsed by the insolvents, and held by the bank of Montreal, became due and was dishonored in November, 1872, and another similar note for \$1,184, in December, 1872, held by the Ontario Bank: that these notes were made for the accommodation of the insolvent, of which the banks had notice: that the plaintiff before the assignment paid the said notes to said banks, and took them up, and was a creditor of the insolvents therefor, until the deed of composition: that part of the plaintiff's claim in this suit, and herein pleaded to, is for the money so paid: that all knowledge of such payments was purposely withheld from the insolvents by the plaintiff until after the first meeting of creditors after the assignment: that the liability of the insolvents for said two notes was mentioned in the statement of their affairs exhibited at said meeting; and the liability of the insolvents to the plaintiff for the amounts so paid by the plaintiff was shewn by a supplementary list of creditors previous to the discharge, and in time to permit the plaintiff obtaining the same dividend as the other creditors: that the plaintiff at the time of the assignment owed the insolvents \$179, which the assignee had the right to set off, and the insolvents were always ready to give notes for the composition of plaintiff's claim as required by the deed, but the plaintiff has always refused to prove his claim against the estate: that forthwith after the insolvents became aware of the plaintiff having paid said notes, they deposited with the assignee notes for the composition on plaintiff's claim in accordance with the deed, after deducting said \$179, which notes remain ready for the plaintiff; and all things have been done, &c., necessary to make said deed binding on the plaintiff as if he were a party thereto.

Second replication, to the three pleas: that there were separate creditors of each of the insolvents at the time of the assignment and of the deed of composition and discharge, and that the plaintiff was not a party to nor did he execute said deed.

*Held*, on demurrer, that the traverse of there being no separate creditors, as alleged in the pleas, was proper; but that the averment that the plaintiff did not execute the deed was no answer to the pleas, for under the facts there stated execution by him was unnecessary.

Third replication, to fifth plea: that the moneys pleaded to were paid by plaintiff to the bank before the bank had proved their claim on the notes, and the plaintiff at the date of the deed of composition was a creditor in respect thereof; and the insolvents never mentioned their liability to the plaintiff therefor in any statement of their affairs, or supplementary list, or in the deed; and said claim was never proved against the estate: *Held*, no answer to the plea, for that, upon all the facts set out, enough was not shewn to make the dealings of the assignee and of the insolvents with the bank as holders of the note unavailing.

The fourth replication to the sixth plea was the same as the third replication, and was *held* also bad.

Fifth replication to the seventh plea: that the plaintiff's name as a creditor, and the claim in that plea mentioned, were not mentioned in the statement exhibited at the first meeting of creditors, or in any supplementary schedule furnished in time to permit plaintiff to obtain the same dividend as other creditors. *Held*, replication good: that, under the Insolvent Act of 1869, there must be a statement of the creditors

exhibited at the first meeting of creditors, as well as of the insolvent's affairs; but that the statement presented at the first meeting, as set out in the plea did sufficiently describe the plaintiff as a creditor; and as the plea therefore alleged that he was so specified, the plaintiff had a right to traverse it.

DEMURRER.

Declaration. First count: For money paid by the plaintiff for Thomas Hunton and Frederick Houghton Hunton, at their request, &c.

Second count: For goods sold and delivered by the plaintiff to Thomas Hunton, at his request, &c.

Fifth plea, as to \$1,050, parcel of the money claimed under the first count, and as to \$1,050, parcel of the money claimed under the second count: that the said sum of \$1,050 in the first count is the same sum as the \$1,050 in the second count mentioned: and that before and at the time of the making of the agreement first hereinafter mentioned, and from thence until the making of the assignment afterwards mentioned, Thomas Hunton and Frederick Houghton Hunton were traders within the meaning of the Insolvent Act of 1869, and carried on business in copartnership under the name of F. Hunton, Son & Co., and during all that time had their domicile at Ottawa, in the county of Carleton, and being unable to meet their engagements they called a meeting of their creditors for the purpose of making a statement to them of their affairs; and such meeting was held and such statement made to the said creditors, and thereupon a majority in number of those of the creditors of the said Thomas Hunton and Frederick Houghton Hunton, who were respectively creditors for \$100 and upwards, and who represented at least three-fourths in value of the liabilities of the said debtors, duly made and entered into an agreement with them for a composition, which was in writing, and was in the words and figures following: [It was dated the 2nd of January, 1873, but it is unnecessary to set it out]. And the said agreement not having been executed by all the creditors, the said Thomas Hunton and Frederick Houghton Hunton, on the 5th of March, 1873, being still unable to meet their

engagements, duly made an assignment, under and pursuant to the said Insolvent Act, of all their estate and effects to Francis Clemow, an official assignee resident within the county of Carleton; and the said interim assignee forthwith, after the execution of the said assignment, duly called a meeting of the creditors of the said insolvents, as required by the said Act; and the said meeting of creditors was thereafter duly held, and the said Francis Clemow was at the said meeting duly appointed assignee to the estate and effects of the said insolvents; and, pending proceedings thereon, a deed of composition and discharge under and within the meaning of the Insolvent Act of 1869 was duly made and entered into between the creditors of the insolvents of the first part, and the insolvents of the second part, and was duly executed by a majority in number of those of the creditors who were respectively creditors of the insolvents for sums of \$100 and upwards, and who represented at least three-fourths in value of the liabilities of the insolvents, and which deed of composition and discharge was and is in the words and figures following, that is to say:

“Insolvent Act of 1869.—This indenture, made the seventeenth day of March, in the year of our Lord one thousand eight hundred and seventy-three, between the several persons whose names and seals are hereunto affixed, who are a majority in number of the creditors of the parties hereto of the second part, who are respectively creditors for sums of one hundred dollars and upwards, and who represent more than three-fourths in value of the liabilities of the said parties hereto of the second part, of the first part; and Thomas Hunton and Frederick Houghton Hunton, both of the city of Ottawa, \* \* merchants and co-partners in trade, carrying on business together as such at the said city of Ottawa under the name, style, and firm of T. Hunton, Son & Co., of the second part.” And, after various recitals, it was witnessed by the indenture that the parties of the first part, in consideration of the premises, &c., and of one dollar to each of them paid, did, and



each and every of them did thereby "absolutely release and discharge the said parties of the second part, \* \* and their and each of their estates and effects, of and from all debts, \* \* which the said parties of the first part, or any of them, or any other person or persons whom they or any of them \* \* can bind by these presents now have or can or may have or otherwise could or might demand from or against the said parties of the second part, or either of them," reserving rights against sureties or endorsers.

The deed further witnessed that the assignee was directed by the parties thereto, on having the said indenture deposited with him, duly executed by the necessary parties, and on receiving the promissory notes agreed to be given in payment of the composition of ten shillings in the pound agreed upon, to execute and deliver to Henry N. Bate, of the city of Ottawa, merchant, such deeds and assurances as should be necessary for effectually vesting in him the whole of the stock-in-trade, property, credits, assets and effects of every description, of the parties of the second part, and of each of them, whether individually or as a partner: and it was further averred that there were no separate creditors of either of the insolvents, and that the deed of composition and discharge duly executed, and the promissory notes, were deposited with the assignee, and that all conditions, &c., were performed to make the same absolute: that the assignee, on the deposit of the deed, gave notice of the deposit by advertisement, as required by the Act of 1869, and no opposition was made to the deed by any creditor within three juridical days after the last publication of said notice, and thereupon the assignee acted upon such deed, and the insolvents thereafter filed the deed in the office of the County Court of the county of Carleton, and gave notice, as provided by the said statute, of the same being filed, and of their intention to apply to the Judge of the County Court of the said county for a confirmation of the discharge effected thereby; and the said Judge afterwards, upon hearing the said application, made an order confirming the said discharge, and all things



happened, &c., to authorize the Judge to make the said order, and to entitle the insolvents to the said order and confirmation: that the order has not been appealed from or reversed, although the time for doing so had long elapsed before the commencement of this suit: that two promissory notes made by the plaintiff, payable to and endorsed by the insolvents, one for \$1,098 and the other for \$973, became due in December, 1872, and were dishonoured, and at and from the making and dishonour until the claim thereon was proved, and the composition on such claim received, as afterwards mentioned, the Bank of British North America were the holders of the same, and entitled to the amount thereof: that the plaintiff made the notes for the accommodation of the insolvents, who were at all times the parties primarily liable thereon, and the plaintiff was surety on the notes for the insolvents, of all which the bank, during all the time aforesaid, had full notice and knowledge: that the liability of the insolvents to the bank on the notes was mentioned and set forth in the statement of affairs of the insolvents exhibited at the first meeting of their creditors after the said assignment: that subsequently to the first meeting of creditors after the assignment, and pending proceedings upon it, the bank duly furnished according to the statute and delivered to the assignee their claim against the insolvents upon the said two notes, and then duly proved their said claim for the full amount of the said two notes, and the liability of the insolvents to the bank upon and for the said two notes also appeared in and by the said claim so furnished to the assignee, as last aforesaid: that the bank, at all times after the maturity of the notes until they received the notes for the composition on their claim, were creditors of the insolvents; and they were parties to and executed the said agreement, and were parties to and executed also the deed of composition and discharge; and notes for the composition of ten shillings in the pound, in all respects as provided and required by the deed, were by the assignee delivered to the bank, who accepted and received the same as the

notes to be given for the said composition according to the terms of the deed : that the plaintiff, before and at the time of the making of the assignment, and until the making of the deed of composition and discharge, was also a creditor of the insolvents', otherwise than and in addition to his being a party as aforesaid to the said two notes ; and all conditions were performed, &c., to make the said deed of composition and discharge binding upon the plaintiff to the same extent as if he were a party to the said deed as one of the parties thereto of the first part : and the said confirmation of the said discharge had never been reversed on appeal or otherwise, and neither said order or confirmation had ever been appealed from : and it was further averred that after the bank had proved their claim on the two notes the plaintiff, as a party to them, was obliged to pay, and did pay to the bank, as the holders of the notes, the moneys due on the same less the amount of the said composition, and part of the plaintiff's claim in the first and second counts is for and in respect of the said money so paid by him to the bank, and are the claims herein pleaded to.

The sixth plea was the same as the fifth plea, excepting as to the last averment, which it omitted, and it proceeded to aver that it was agreed between the plaintiff and the bank, in respect of the same two notes, that the plaintiff should pay the bank one half the amount of the notes ; and to enable the bank to realize the other half of the notes, that the bank should have the right to proceed against the insolvents and their estate for the whole amount of notes, and should prove for the whole amount on the insolvents' estate, and receive all dividends and compositions thereon. And, in pursuance of the agreement, the plaintiff then paid to the bank one half of the amount due on the notes ; and the bank afterwards, and after the assignment, and in pursuance of the agreement, and with the full knowledge, consent, and request of the plaintiff, proved against the estate of the insolvents for the whole amount of the said notes, and ranked upon the estate for the full amount

thereof, and received the composition thereon, as in the fifth plea alleged; and part of the claim in the first and second counts mentioned is for and in respect of the said money so paid by the plaintiff to the bank, and is the claim herein pleaded to.

Seventh plea, as to \$1,934 in the first count, and the like sum in the second count, being different sums from those in the fifth plea pleaded to: that they are the same sum, and not different sums, and, as to the same, the allegation in the part of the fifth plea down to the averment, and including it, "that the order or confirmation had not been appealed from," are true in substance and in fact: and the plaintiff had at all times full notice and knowledge of all the facts aforesaid and of those hereinafter mentioned: that a promissory note for \$750 made by the plaintiff payable to and endorsed by the insolvents became due in November, 1872, and was dishonoured, and the Bank of Montreal, from the time of the maturity and dishonour of the note, until it was paid as afterwards mentioned, were the holders of it and entitled to the amount thereof. And that another promissory note for \$1,184, made by the plaintiff payable to and endorsed by the insolvents, became due in December, 1872, and was dishonoured, and the Ontario Bank, from the maturity and dishonour thereof until the amount of it was paid, as herein mentioned, were the holders of the same and entitled to the money thereby made payable: that the two notes were made by the plaintiff for the accommodation of the insolvents, and the debts represented by the said two notes were the debts of the insolvents at all times while the banks were the holders thereof; and the insolvents were primarily liable thereon, and the plaintiff was only a surety for the insolvents thereon, of all which the banks during all the time aforesaid had notice: that the banks were two of the creditors who made, entered into, and signed the agreement firstly mentioned in the fifth plea, and after the making of the said agreement, and before the assignment, the plaintiff paid to the Bank of Montreal the amount of the first-

mentioned note, and also paid to the Ontario Bank the amount of the second note, and he then received the said notes from the banks. And the plaintiff became and was a creditor of the insolvents to the extent of the amounts so paid, and continued such creditor until the making of the said deed of composition and discharge, but subject to the set-off herein mentioned : and the plaintiff claims as such creditor, for and in respect of the amounts so paid, subject as aforesaid, provable against the estate of the insolvents, at all times from and after the making of the said assignment; and part of the plaintiff's claim in the first and second counts is for and in respect of the amounts so paid, and which are the claims herein pleaded to : that neither of the insolvents had any notice or knowledge of said payments by the plaintiff until after the first meeting of their creditors after the assignment, and such notice or knowledge was always purposely and intentionally withheld from the insolvents, and each of them, by the plaintiff : that the liabilities of the insolvents for the said two notes ..and the several amounts thereof were mentioned and set forth in the statement of their affairs exhibited at the first meeting of their creditors after the assignment ; and the said notes were mentioned and described in such statement as notes made by the plaintiff for the accommodation of the said insolvents ; and the liability of the insolvents to the plaintiff for the amounts so paid by him to the banks was shewn by a supplementary list of creditors furnished by the insolvents previous to their discharge, and in time to permit the plaintiff (who was therein mentioned), obtaining the same dividends as the other creditors upon their estate : that the plaintiff, before and at the time of the assignment, was indebted to the insolvents in the sum of \$179, and which debt the insolvents were at all times entitled to set off against the plaintiff's claim for the amounts so paid, and the right to which debt passed to the assignee by the assignment ; and the said debt was never paid or satisfied except as herein mentioned ; and the assignee had, at all times after the assignment, the right to set off and deduct



the said debt of \$179 from and against an equal amount of the plaintiff's said claim; and the insolvents were at all times ready and willing to deliver to the assignee for the plaintiff promissory notes made and endorsed in all respects and particulars as provided or required by the deed of composition and discharge, for the composition of ten shillings in the pound of the plaintiff's claim; but the plaintiff has always refused to prove his said claim against the said estate, although both the plaintiff and the assignee have at all times since the assignment resided at the city of Ottawa, and the plaintiff could at any time have proved the same against the estate: that forthwith, after the insolvents had notice or knowledge of the plaintiff having paid the amounts of said notes to the banks as aforesaid, and before the said discharge of the insolvents, the assignee and the insolvents set off and deducted the said debt of \$179 from and against an equal amount of the plaintiff's said claim, and the insolvents then deposited with the said assignee promissory notes made and endorsed in all respects and particulars as required or provided by the deed of composition and discharge for the full amount of the said composition of ten shillings in the pound of the balance of the plaintiff's said claim after \$179 had been deducted and set off as aforesaid. And the insolvents deposited the said last mentioned notes with the assignee for the plaintiff, and for the purpose of their being delivered to the plaintiff under and pursuant to the deed of composition and discharge, and the said notes have ever since remained in the hands of the assignee ready to be delivered to the plaintiff; and all conditions were performed and all things happened necessary to make the deed of composition and discharge binding upon the plaintiff, to the same extent as if he were a party to said deed as one of the parties thereto of the first part, and all the facts and matters herein alleged occurred before the commencement of this suit.

Second replication to fifth, sixth and seventh pleas: that there were separate creditors of each of the insolvents at

the time of the making of the assignment, and of the deed of composition and discharge. And the plaintiff says he was not a party to and did not execute the said deed or the said agreement in the pleas set forth and referred to, by reason whereof the deed of composition and discharge is invalid, and of no effect against the plaintiff.

Demurrer to second replication : because it does not shew that the deed of composition and discharge does not provide for the alleged separate creditors, or that such separate creditors are not entitled to the same benefits under the said deed as the other creditors of the insolvents.

That the deed, as set out in the fifth plea, does provide for the separate creditors, and gives them equal rights with the other creditors.

That the plaintiff was not a separate creditor, and cannot set up that separate creditors are not provided for by the deed.

That the replication is pleaded to the fifth, sixth, and seventh pleas, but shews no sufficient answer to the fifth plea, inasmuch as it appears by that plea that the Bank of British North America, the holder of the said two notes, were parties to and executed the deed of composition and discharge, and for the same reason shews no sufficient answer to the fifth, sixth, and seventh pleas, or any of them.

Joinder.

Third replication to fifth plea : that the moneys pleaded to in the fifth plea were paid by the plaintiff to the bank before the making of the assignment and of the deed of composition and discharge, and before the bank had proved their claim on the said two notes. And the plaintiff was, at the date of the agreement and of the deed of composition and discharge, a creditor of the insolvents in respect thereof ; and the insolvents did not, either at the time of making the assignment or at any other time, mention and set forth their liability to the plaintiff for the said moneys, in any statement of their affairs ; nor was the claim of the plaintiff ever shewn by any list or supplementary list of creditors furnished by the insolvents to the assignee, or filed with the assignment, or deed of composition and discharge ; nor

did the insolvents, in any such list or statement, ever shew that the plaintiff was a creditor of the insolvents, or the amount or nature of his debt, and the said claim was never proved against the estate of the insolvents.

Demurrer to third replication: because it does not deny that the Bank of British North America were the holders of the said two notes, and entitled to the moneys made payable thereby, down to the time they proved their claim and received the composition on the said two notes, as in the plea alleged; nor that the liabilities of the insolvents for the amount of the notes to the bank was mentioned or set forth in the statement of their affairs.

That, upon the facts disclosed in the plea and replication, the bank was entitled to prove against and rank upon the estate of the insolvents for the full amount of the notes, and the liability of the insolvents was correctly mentioned in the statement of their affairs.

That the plaintiff was only a surety upon or in respect of the said notes, and can stand only in the place of the banks.

That the notes could not be proved or rank as a claim more than once, and the bank proved and ranked on the whole amount of said notes.

That the discharge relied upon in the fifth plea was and is under a deed of composition and discharge, and it is sufficient that the plaintiff was a creditor, as claimed in the replication, and it was not necessary to such a discharge that the liability of the plaintiff should have been mentioned or set forth in any statement of affairs, or have been shewn by any list of creditors, or have appeared by any claim furnished to the assignee.

That by law such a discharge is good as against all creditors of the insolvents.

That the replication shews no sufficient answer to the plea.  
Joinder.

Fourth replication to sixth plea: The plaintiff repeats all the allegations in the third replication, and says he did not agree with the said bank, as alleged.

Demurrer to fourth replication—because the same matters of law that are stated as objections to the third replication, which the defendant now repeats and re-states, are objections to the fourth replication. Joinder.

Fifth replication to seventh plea: that the plaintiff's name as a creditor of the insolvents, and the claim in the seventh plea mentioned, was not mentioned in the statement exhibited at the first meeting of creditors of the insolvents, nor in any supplementary schedule or list of creditors furnished by the insolvents previous to their discharge, and in time to permit of the plaintiff obtaining the same dividend as other creditors upon their estate.

Demurrer to fifth replication—because the seventh plea sets up a discharge or release under a deed of composition and discharge, and shews the plaintiff to have been a creditor at the time of the assignment, and also at the time of making the said deed.

That by law the said deed was binding on the plaintiff and all other creditors, whether their names or claims, or the liabilities of the insolvents to such creditors, were mentioned in any statement of affairs or in any supplementary schedule or list of creditors.

That the replication takes issue on or states immaterial matter and show no sufficient answer to the seventh plea.

That the liability of the insolvents on the said notes in the seventh plea mentioned, was mentioned in the statement of their affairs; and the said notes were mentioned and described in such statement as notes made by the plaintiff for the accommodation of the insolvents, which was a sufficient statement of their liability on the said notes, or of their liability to the plaintiff arising from the said notes, or from any assignment made thereon. Joinder.

*S. Richards*, Q. C., for the demurrer. The plaintiff alleges that he held the notes sued on at the time of the assignment in insolvency, and that his name was not contained in the list of debts and of creditors presented to the creditors. Different banks held the notes at the



time when the agreement of the 2nd of January, 1873, was entered into between the plaintiff and the majority of his creditors, but that was before the assignment in insolvency, and the insolvents believed when they made the assignment the banks still held the notes. The fifth plea sets up an agreement between the plaintiff and the Bank of British North America, *after* the insolvents' assignment, that the bank should prove for the claim in that plea mentioned in the name of the bank. The sixth plea sets up an agreement to that effect, made *before* the assignment. The seventh plea is as to other notes than those in the fifth and sixth pleas mentioned; and it alleges that the plaintiff's name was inserted in a supplementary list as a creditor for the notes in that plea mentioned; and it also alleges that, although the plaintiff had paid the notes to the banks which held them before the assignment, he purposely withheld from the insolvents that he had so paid the notes before the assignment. The second replication, which sets up there were separate creditors of the insolvents, and that the plaintiff did not execute, and that the separate creditors are not parties to the deed of composition and discharge, is a bad pleading, because the deed which is set out shews the terms of it are large enough to include both the partnership and the separate creditors: *In re Garratt*, 28 U. C. R. 266; *Allan v. Garratt*, 30 U. C. R. 165.

The third replication is objectionable, because the fifth plea does shew the note was sufficiently described in the statement of the insolvents' liabilities. It was described as a note made by the plaintiff for the insolvents' accommodation, payable to and endorsed by them to the bank. It was, therefore, sufficiently described to shew the plaintiff that the notes in question were provided for by the insolvents: *Cameron v. Holland*, 29 U. C. R. 506, and the cases cited there.

(Here it was stated that this was a mistake;—that the notes in the fifth and sixth pleas are not so described in the schedule, it is only the notes in the seventh plea which are so described—but that that was an omission;

and Mr. Richards asked leave to amend the fifth and sixth pleas in that respect.)

It is contended that it was not necessary the names of the creditors should be specified in the statement of liabilities, because by section 94 of the Act of 1869, the deed of composition and discharge authorized by that Act, may be made "before, pending, or after proceedings upon an assignment, or for the compulsory liquidation of the estate of the insolvent;" and if the deed may be made *before* the assignment, there cannot be a list or statement of liabilities or of creditors at all. The previous enactment in the Act of 1864, sec. 9, sub-sec. 1, is worded somewhat to the same effect; but it is there added that such discharge shall have the same effect as an ordinary discharge obtained as hereinafter provided." The fourth replication to the sixth plea is the same as the third replication to the fifth plea. As to the fifth replication to the seventh plea, the notes were fully described in the statement of liabilities, as notes made by the plaintiff for the insolvents' accommodation; but it was not necessary to name the creditors at all in the statement, for the purpose of making the deed of composition and discharge effectual.

*F. Osler, contra.* There was a case between these parties pending in the Common Pleas, which was argued before the Chief Justice of this Court, while sitting for the full Court in vacation. The judgment he then gave has not been published (*a.*) Although a deed of composition and discharge may be made *before* proceedings upon the assignment are taken, it is of no effect unless it be brought within the Insolvent Court and proceedings are taken in the Insolvent Court upon it: *Green v. Swan*, 22 C. P. 307. The statement of the insolvents' liabilities made up in the proper form cannot, therefore, be considered as dispensed with. The second replication is good, for it traverses the allegation made by the defendant, that there were no separate creditors of the insolvents; and the deed does

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(*a*) This judgment does not appear to have been handed to the Reporter of the Common Pleas.

not convey separate estate, nor provide for separate creditors, as it should have done: *Ex parte Glen*, L. R. 2 ch. 670; *Tomlin v. Dutton*, L. R. 3 Q. B. 466; *Rixon v. Emary*, L. R. 3 C. P. 546; *Waddington v. Roberts*, L. R. 3 Q. B. 579. The third replication is also good, for it traverses an allegation in the plea that the money was paid by the plaintiff after the assignment. The plaintiff says it was paid before the assignment. In the latter case, the plaintiff's name should have been specified in the statement of the insolvents' liabilities as a creditor, which was not done. In the former case, the plaintiff, by paying after the assignment, could still have ranked for the debt in his own name, in place of that of the creditor whose claim he had paid: Insolvent Act, 1869, sec. 56. The fourth replication to the sixth plea, is the same as the third replication to the fifth plea; the only difference is, that the sixth plea alleges the plaintiff paid the notes mentioned in it *before* the assignment, under a special agreement with the bank, that the bank should rank for the debt. The argument as to the third replication will equally apply to the fourth replication. The fifth replication to the seventh plea must be sufficient, for it asserts the plaintiff's name was not contained in the statement of the insolvents' creditors, and it denies that the supplementary list was filed in time to permit the plaintiff to get an equal dividend with the other creditors as alleged in the plea. He referred to *King v. Smith*, 19 C. P. 319; *Shaw v. Massie*, 21 C. P. 266.

September 17, 1875, WILSON, J.—The substance of the fifth plea is, that on the 5th of March, 1873, the insolvents made an assignment in insolvency, and on the 17th of the same month that a deed of composition and discharge was executed by the proper number and value of their creditors upon certain terms, which were duly carried out by the insolvents; that there were no separate creditors of the insolvents; and that the composition and discharge were confirmed by the Judge.

That the two promissory notes became due in December, 1872, they being made by the plaintiff for the insolvents' accommodation, and were dishonoured and were then and up to the time of the payment of the composition held by the bank.

That the liability of the insolvents to the bank was set out in the statement of their affairs at the first meeting of creditors in which statement the notes were stated to have been made by the plaintiff for the accommodation of the insolvents: that the bank, after the assignment under the Act, delivered to the assignee their claim against the insolvents, and proved it for the full amount of the two notes; and were the creditors of the insolvents until they received the composition notes.

That the bank executed the deed of composition and discharge, and received the composition; and that after the bank had proved their claim on the two notes, the plaintiff; as a surety for payment of them, was obliged to pay and did pay the bank, as holders, the amount of the notes, less the composition aforesaid received by the bank.

The second replication, which is to the fifth, sixth, and seventh pleas, takes issue on the allegation that there were no separate creditors; and I think rightly; for the deed of composition and discharge is not made with any other creditors than those of the partnership, and the plaintiff is not therefore concluded from taking the traverse he does take on that point.

As the pleas aver there were no separate creditors, the deed is valid in law by reason of that averment. The second replication also states that the plaintiff did not execute the deed, by reason whereof it is of no effect as against him.

As to the fifth plea, it shews the deed was duly executed by the banks, who were then the creditors of the insolvents and the holders of the notes, and therefore that they and not the plaintiff were the proper parties to have executed the deed in respect of the notes.



That replication is not sustainable for that cause as an answer to the fifth plea.

It is not sustainable either as to the sixth plea, which is similar to the fifth, excepting that the last allegation in the fifth plea, that, after the bank had paid their claim the plaintiff paid to the bank the amount of the two notes, less the composition received by the bank, is omitted in the sixth plea; and it is then continued, that after the bank had become a party to the agreement, and before the insolvents made the assignment, it was agreed between the bank and the plaintiff that the plaintiff should forthwith pay the bank half the amount of the two notes, and that the bank should prove against the insolvents' estate for the full amount of the notes, and so recover the other half by way of composition from the estate; and that the bank did so rank and prove for the notes and receive the composition.

The assertion that the plaintiff did not execute the deed, and that it is void as to him, is of no force against the matters of the sixth plea.

So far as the second replication applies to the seventh plea, which treats of two different notes, it is also not a sufficient answer. That plea sets out the fifth plea down to and including the allegation that the confirmation of discharge has never been reversed; and it continues that the banks therein mentioned held the two accommodation notes made by the plaintiff for the insolvents, until they were paid by the plaintiff after the making of the agreement of January and before the assignment of the 5th of March, and so became a creditor for the same of the insolvents, subject to a set-off he owed them of \$179.

That the insolvents had no notice or knowledge of such payment by the plaintiff until after the assignment and after the first meeting of creditors, and that the plaintiff purposely withheld such notice or knowledge from them.

That the notes were described in the statement of the insolvents' liabilities as made by the plaintiff for their accommodation, and the insolvents' liability to the plaintiff

was shewn by a supplementary list of creditors furnished by the insolvents before their discharge, and in time to permit the plaintiff, who was therein named, obtaining the same dividends as the other creditors of the estate.

That the insolvents were at all times ready to deliver to the assignee for the plaintiff the promissory notes agreed upon by the creditor as the composition, for the plaintiff's full share thereof; but the plaintiff has always refused to prove his claim against the estate.

That forthwith after the insolvents had notice of the plaintiff having paid the banks, and before the discharge, the insolvents, after deducting their set-off of \$179 from the plaintiff's share of the composition, deposited notes with the assignee made and endorsed in all respects and particulars as required by the deed of composition and discharge for the plaintiff, ready to be delivered to the plaintiff; and all conditions, &c., happened to make the deed of composition and discharge binding on the plaintiff, to the same extent as if he were a party to it.

By the 56th section of the Act of 1869, the plaintiff should have been the creditor to rank upon the estate. It is not necessary on this replication to say whether the plaintiff was sufficiently named by the banks being named as creditors for claims against the insolvents upon notes which the plaintiff had made for the accommodation of the insolvents. It appears the plaintiff's name was put on a supplementary list of creditors under the 98th section in time to permit him to receive the same dividends as the other creditors, and that the insolvents carried out towards him, as far as they could, all the provisions of the deed of composition and discharge.

It was not necessary, therefore, under these circumstances, that the plaintiff should have executed the deed.

There will be judgment on the demurrer to the second replication for the defendant.

The third replication would certainly have been objectionable on special demurrer under the former rule of pleading, because the plea alleges the banks were holders

of the notes, and the creditors in respect of them, up to the time the composition notes were given—and that the plaintiff paid the banks after the banks had proved their claim : while the replication passes the principal allegations so made by, and states that the plaintiff paid the banks before the making of the assignment, and before the banks had proved their claim, which is the only direct traverse made, and then it asserts the plaintiff was a creditor of the insolvents in respect of the notes at the time of the assignment, and his name was not on any list whatever as a creditor, and the claim was not proved against the insolvents.

There is no direct traverse of the banks being the holders and creditors upon the notes. The plaintiff does not only not deny that the banks were the holders of the notes as stated in the plea—he does not allege that he himself ever held the notes.

We are not called on to say whether the banks could or could not, although paid by the plaintiff, proceed in insolvency as the holders of the notes for the benefit of the plaintiff. *Cook v. Lister*, 13 C. B. N. S. 543, is against that right.

It may be said the plaintiff had the right to prove his own debt, and if the banks did hold the notes, they held them as agents for him.

But it may be said with greater force that, if after payment by the plaintiff to the banks, he still allowed them to retain possession of the notes as holders, he must be liable for all matters done by them with these notes ; and for all dealing which others have had with them in respect of the notes, while they were in ignorance of the plaintiff's rights and believed the banks to be the true and lawful holders of the notes for their own benefit.

I am of opinion that, looking at the whole facts of the plea, and at those which the replication sets up, that the replication does not shew enough to make the dealings of the assignee and of the insolvents with the banks as the holders of the notes throughout all these proceedings, abortive and unavailing. The holder of the notes is the person entitled to payment.

The judgment will therefore be against the validity of the third replication.

As to the fourth replication, it is the same to the sixth plea, as the third replication to the fifth plea.

If the third replication is not an answer to the fifth plea, the fourth replication, in the same words, can be still less a good answer to the sixth plea, which, while shewing a payment by the plaintiff before the assignment, expressly avers that it was by the special agreement of the plaintiff with the banks that the banks were to prove and make claim for the debt in their own name, and receive the composition agreed upon for their own benefit; and not one word of that is traversed by the replication.

The judgment will be also against the fourth replication.

Then as to the fifth replication to the seventh plea, it alleges the plaintiff's name as a creditor of the insolvents was not named in the statement exhibited at the first meeting of the creditors, nor in any supplementary schedule or list of creditors furnished by the insolvents previous to their discharge, and in time to permit of the plaintiff obtaining the same dividend as the other creditors.

That is a direct traverse of matters which are set forth in the plea. The statement that the plaintiff's name was not in the list as a creditor presented at the first meeting of creditors, is not in one view a traverse, for to some extent that is admitted by the plea.

But what is contended by the defendants' counsel is, firstly, that the names of the creditors need not appear in any such statement of liabilities; and, secondly, that the plea does shew the plaintiff's name appears on the list as a creditor, because it is declared in the statement that the plaintiff made the notes in question for the accommodation of the insolvents and so he did appear as a creditor of theirs upon the list, although it was shewn the banks were also creditors of both the plaintiff and the insolvents.

I think sections 3, 4, 5, 56, 69, 98, 119, 122, and form Q in schedule, shew there must be a statement of the insolvent's affairs exhibited at the first meeting of his



creditors, and, as I think, a list of his creditors also. The expression in section 98, of a supplementary list of creditors, read in connection with the other provisions of the Act, shews it. There can be no proper statement of the insolvents' affairs made if the names of none of their creditors are given. The great purpose of the whole proceeding is to enable the assignee to deal with the creditors on behalf of the debtors. *King v. Smith*, 19 C. P. 319, is expressly in point.

Then the only other question is, whether the plaintiff can be said to have been named as a creditor when the banks were named as the creditors, and proved the debts upon notes which were described to have been made by the plaintiff as an accommodation party for the insolvents?

Is the statement that the notes were made by the plaintiff for the accommodation of the insolvents a statement of his name as a creditor?

It does thereby appear he was a creditor as a surety. And if he had been in fact only that at the time, he would be entitled, when he paid the debt, to stand in the place of the creditor: section 56. But he was in fact then the real and actual creditor.

I am of opinion that as the *two notes* have been duly set forth in the statement of liabilities presented at the first meeting of creditors, and as it is shewn in that statement that the plaintiff was an accommodation party only for the insolvents, that the insolvents did shew they were indebted to the banks whose names were inserted as the holders of the notes, and that they were also indebted to the plaintiff as their surety, upon the notes.

As the banks were not then in fact the creditors, having been paid by the plaintiff shortly before the assignment, but unknown to the insolvents, and as they have alleged, which is not denied, that of that fact the plaintiff kept them purposely ignorant, and as the plaintiff was the creditor, I am disposed to think, according to the authorities, that the statement presented at the first meeting of creditors did sufficiently describe the plaintiff as a creditor,

and more especially as the seventh plea has alleged that "the plaintiff had at all times full notice and knowledge of all the facts in the said allegations respectively set forth, and of all the facts hereinafter alleged," and that allegation he has not denied.

I refer to *Reeves v. Lambert*, 4 B. & C. 214; *Beck v. Beverly*, 11 M. & W. 845; *Lambert v. Smith*, 11 C. B. 358.

But if that be the meaning of the plea, the plaintiff has the right to traverse it. If it is not the meaning of it, the traverse is of no consequence, as there is a good traverse in the same replication relative to the supplementary list.

While I am of opinion the plea does shew a specification of the plaintiff as a creditor in the original statement, I must hold the plaintiff has a perfect right to traverse that fact. I conceive the replication is quite right in denying the naming of the plaintiff as a creditor in the original or in the supplementary list of creditors, because, as already stated, the statute apparently requires the creditors shall be named.

The judgment will be against the defendant upon this demurrer.

The result is, there will be judgment for the defendant on the demurrers to the second, third, and fourth replications, and for the plaintiff on the demurrer to the fifth replication.

MORRISON, J., concurred.

*Judgment accordingly.*

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## TOWER V. WILLIAM R. TUDHOPE, AND JAMES TUDHOPE.

*Sale of goods—Acceptance and receipt.*

The plaintiff, who lived in New York, agreed, at Orillia, in this Province, through his agent, to sell to the defendants there certain goods, to be forwarded from New York by express. This agent had on the same day sold goods to W. T., another person in Orillia, and it was agreed between W. T., the agent, and the defendants, that the defendants' goods also should be directed to W. T. The goods for defendants and for W. T. were sent, as agreed upon, to W. T. in one case, and invoices were sent to W. T. and the defendants of their respective purchases. W. T. was notified of the arrival of the goods in Toronto, and about the middle of July sent down the invoices to pass them through the Customs, but they were passed and duties paid upon W. T.'s invoice only, and the Customs department believing that there was an attempt at fraud, seized the goods and sold them in September as forfeited. Neither the defendants nor W. T. had made any special enquiries after receiving the invoices, and they never informed the plaintiff of the facts: *Held*, that this was a dealing with the goods by defendants through W. T., for whom they were responsible, which was evidence of an assumption of ownership, and of a receipt and acceptance sufficient within the Statute of Frauds; and that defendants therefore were liable in an action on the common counts for goods sold.

APPEAL from the decision of the Judge of the County Court of the County of York.

The declaration was on the common counts.

Plea, never indebted. Issue.

The evidence was in substance as follows:

*P. Lyon*, who resides in New York, where the plaintiff carries on business, examined under commission, said: I was the plaintiff's commercial traveller; I sold the defendants a bill of goods on the 17th of June, 1874; I first sold a bill of goods to W. & J. Tudhope, and then went across the street to Tudhope Brothers, the defendants, and sold them also a bill of goods; I asked them how they should be shipped; they said by express, as I suggested; I said I had just sold a bill of goods to the other Tudhope firm, and I asked them if they would like to have them shipped together, as it would save expense; they acceded to the suggestion; Both Tudhopes were present; I then went to the other Tudhope firm and said I was going to ship the two lots together, and they asked to have them shipped to them;

nothing was said between defendants and myself who was to pay the express charges ; I do not know the goods were shipped of my own knowledge ; they were to be paid for thirty days after date of invoice.

*Cross-examination* : I was not to send the goods to defendants direct by express ; I was to send them enclosed in W. & J. Tudhope's parcel, or W. & J. Tudhope's enclosed in theirs ; defendants said they did not care to which of the two it was addressed ; the enclosing of the two purchases in one parcel was distinctly discussed between the defendants and myself ; the prices of the goods were the New York prices—not the prices of the goods laid down at Orillia ; I was under no contract to deliver the goods at Orillia. It was a verbal order the defendants gave ; both defendants were present when the bargain was made ; I made an agreement with W. & J. Tudhope that they should deliver the goods to defendants ; the contract with defendants would be fulfilled by putting their goods in the express addressed to W. & J. Tudhope, Orillia.

*Re-examination* : W. & J. Tudhope were acting for the defendants.

*Re-cross-examination* : No express company in New York has an agency in Orillia that I know of.

*Second re-examination* : W. & J. Tudhope said "Enclose the defendants' goods with ours, and we will send them over," and I said, all right.

*William R. Tudhope*, one of the defendants, whose examination under the order of the Judge was read at the trial, said : I remember Mr. Tower's agent calling last spring ; I ordered goods from him ; the goods mentioned in the account now shewn to me, and marked exhibit A. ; they were to be sent with some goods sent to W. & J. Tudhope ; nothing said about express charges ; I expected we would have to pay part of express charges ; I never was notified of the arrival of the parcel in Toronto ; I heard from W. & J. Tudhope that the goods had arrived in Toronto ; I took no steps to have the goods passed through the custom-house ; I did not send any invoice to Toronto ; I gave



W. & J. Tudhope the invoice I received ; they wanted it to send to Toronto to pass the goods. I do not know if they sent the invoice to Toronto ; I never made any arrangement with W. & J. Tudhope to pass my goods with his on the invoice of his goods alone, or on my invoice alone ; I do not know whether W. & J. Tudhope tried to pass the goods on one invoice alone ; the invoice price of goods I ordered, was \$61.75 ; I do not know what goods W. & J. Tudhope ordered ; I represented the firm of Tudhope Brothers, at the time the order was given ; the firm is composed of myself and James Tudhope ; the firm of W. & J. Tudhope was composed of W. Tudhope alone ; James Tudhope was originally in the firm of W. & J. Tudhope.

*Cross-examination* : The agreement was, that the goods were to be delivered here with W. & J. Tudhope's goods ; I never received notice from the custom-house that the goods were there ; as far as I remember, the goods have never been delivered to me ; there was nothing said at the time of the purchase of the goods who should pass them through the custom house, or pay the customs dues ; I gave W. Tudhope the invoice to send to Toronto, because the goods were shipped to him, and it was the only way I could get them ; the invoice I gave him was the one I received from the plaintiff ; the goods were not entered as far as I know in the custom house ; the next I heard of the goods was a notice from the custom house that they would be forwarded in a few days ; I telegraphed to the custom house to ask why they had not been forwarded, and the reply I received was that they had been seized and sold for false entry ; I never sent any invoice of the goods to the custom house ; I have used every endeavour to get the goods, and was very anxious to get them ; I did not know any reason why the goods were not sent forward until I received the telegram from the custom house ; the agent from whom I ordered the goods suggested they should be sent with W. & J. Tudhope's goods.

*James Tudhope*, the other defendant, said : I have heard

the evidence given by W. R. Tudhope, and corroborate it in all particulars.

*Philip E. Bishop*, said: I am clerk in the Canadian and American Express Office, as custom-house clerk, to pass parcels for the express companies; the goods were received in July, for W. & J. Tudhope, Orillia; I notified them on the arrival; I received an invoice from Orillia from Vickers' Express; I passed the goods, paying the duty. It was found on examination that the package of goods did not agree with the invoice, and the goods were detained by the customs' department. About three days after a note came from the express agent, and two invoices. The American Express Company does not do business north of Toronto.

*Cross-examination*: I am employed by the American Express Company, and I act for Vickers' Express upon invoices that come from them to us; Miller was agent for Vickers' Express Company at the time at Orillia; exhibit No. 1 is by Miller; no parcel was addressed to the defendants, it was to W. & J. Tudhope; I received answer No. 1; No. 2 came with invoice; No. 2 in same writing as No. 1, and directed to Mr. Irwin, agent of the American and Canadian Express Company.

Mr. *Inglis*, appraiser of customs, said: The goods were passed on an invoice, and it was found after they did not correspond with the invoice; when the original invoices were produced, it was found the goods corresponded with them, and they were then seized, because they had been passed under wrong invoices, and sold.

*William Tudhope*, sole member of the firm of W. & J. Tudhope, said: I received an invoice of the goods I bought through Lyon, the plaintiffs' agent; Miller, the express agent, asked me for my invoice, and I gave it to him, it was the only one I then had, which has been produced here, No. 3; the same day Miller asked me to get the invoice from Tudhope Brothers; I got it and gave it to him; No. 4 now produced; I made no arrangement with Lyons how the goods were to be sent,

only to pay in thirty days after receipt of goods at Orillia ; I did not hear anything about the goods of Tudhope Brothers' from Lyon ; Miller came to me and said there were goods for me, and wanted invoice ; I gave it to him ; he did not ask for any other invoice ; I did not then know anything of Tudhope Brothers' invoice ; I did not inform the defendants of any invoice, or of its delivery to Miller ; Miller came about three days after and wanted the original invoice to send to Toronto, and he asked me to get the defendants' invoice ; I got it from them and gave it to Miller ; I did not then know the goods had been seized ; I did not know the parcel for defendants was to be sent in mine ; I gave Miller no directions about making out and copying the invoice ; he told me the invoices were not exactly alike, but that it was all right ; I gave him no instructions whatever about the invoices ; he has no interest in my affairs ; I do not know where he is now ; I took no steps on hearing of the seizure ; I bargained for my goods to be delivered to me at Orillia.

*Thomas Escott*, surveyor of customs, said : I found the inside package addressed to Tudhope Brothers, who had not presented any invoice whatever ; the first invoice that appeared for them was a true invoice ; its presentation was a confirmation of the fraud, and the goods were seized ; it is not unusual for a package to be enclosed, but it should be noticed on the invoice, and the invoice sent should have shewn that the package contained the articles for defendants ; then it would have been correct ; it would not have been sufficient to have made it on the outside of the package.

For the defence, *W. R. Tudhope*, one of the defendants, said : The agreement was, that the goods were to be delivered to us (the defendants) at Orillia ; nothing was said of the time or way of payment ; I did not know whether they were cash on delivery ; Lyon asked if he would send the goods by express, I consented to his doing so ; the first notice we had of the arrival of the goods was about the 15th of July from W. Tudhope, when he asked

for an invoice, which we then gave him; Lyon suggested to have the goods sent to W. & J. Tudhope; I never knew there was anything wrong in the invoice till after this suit; I think I was in error in saying in my former examination I received notice from the custom house that the goods would be forwarded in a few days; what I should have said was that the notice was from the Express Company; the next notice I had was on the 21st of September; I got a telegram that the goods had been seized and sold; I had no opportunity, previously, to make any explanation to the customs; I did not know of the arrival of the goods when I gave W. Tudhope the invoice, except from what he said, and he did not say where they were, whether at the station or at the custom house, or in possession of the railway; I did not care about the goods being sent to W. & J. Tudhope so long as I got them.

*James Tudhope*, the other defendant, gave evidence somewhat to the same effect as his co-defendant. He said, however: We assented to the goods being sent to W. & J. Tudhope, at the agent's suggestion; \* \* \* I did not know that W. & J. Tudhope had to do with our goods; I expected the goods would come together; do not know how they were to be arranged together, or how they were arranged.

The defendants' counsel made some objections to the plaintiff's right of recovery, and among them that there was no acceptance of the goods by them. Leave was reserved to move to enter a nonsuit upon the objections taken.

The learned Judge directed the jury that if there were no acceptance by the defendants of the goods they were not liable: that the evidence as to the dealing between the parties must be looked at, and the transmission to the defendants of the invoice and their dealing with it; and that they must say, from these facts, and from the delivery by the plaintiffs to the Express Company as carriers for the defendants, whether these circumstances did not all shew a delivery by the plaintiffs to the defendants, and an acceptance by them of the goods in question?



The defendants' counsel objected to the charge, that as they had not had any opportunity to examine the goods there could have been no acceptance of them.

The verdict was for the plaintiff, and damages \$61.50.

The defendants obtained a rule afterwards, calling on the plaintiff to shew cause why the verdict should not be set aside and a nonsuit entered, or a new trial be granted upon the different grounds specified in the rule.

The rule was made absolute for a nonsuit.

The plaintiff appealed, on the following grounds :—That the learned Judge was wrong in reserving the defendants leave to enter a nonsuit, and in setting aside the verdict and entering a nonsuit.

That there was sufficient evidence upon which the jury were justified in finding a verdict for the plaintiff.

That the defendants having admitted that William Tudhope acted as their agent in passing their goods at the custom house, they were responsible for his act in endeavoring to pass them through by a false entry.

August 30, 1875. *Thorne* for the appellant. There was an acceptance by the defendants of the goods. The delay which they permitted of the goods at the custom house without any notice to the plaintiff, and the acts which they did in giving their invoice to have them passed, were an acceptance of the goods. By reason of their conduct, in conjunction with that of W. & J. Tudhope, the goods have been forfeited and lost to the plaintiff. He referred to *Benjamin* on Sales, 2nd ed., 114–130; *Chaplin v. Rogers*, 1 East 192, 194; *Morton v. Tibbett*, 19 L. J. Q. B. 382, S. C. 15 Q. B. 428.

*M. C. Cameron*, Q.C., contra. The contract in question required a writing, or there should have been a delivery and acceptance. Delivery to a carrier is not an acceptance by the purchaser. Were, then, W. & J. Tudhope the agents of the defendants, so as to bind them by the acts which they did for them in respect of these goods? The defendants assented to the goods being sent to them in the

parcel of W. & J. Tudhope; they did not desire it nor require them to be so sent; the plaintiff's agent proposed it and they assented to it. The place of delivery was Orillia, at the defendants' place of business, and where the agreement was made with the plaintiff's agent, and it is admitted the goods never arrived there. There having been no writing, nor any delivery or acceptance, and no agency of W. & J. Tudhope to bind the defendants having been established, the sale was not proved, and the nonsuit was rightly entered: *Norman v. Phillips*, 14 M. & W. 277; *Hart v. Bush*, E. B. & E. 494, 498; *Meredith v. Meigh*, 2 E. & B. 364, 368; *Currie v. Anderson*, 2 E. & E. 592; *O'Neil v. McIlmoyle*, 34 U. C. R. 236; *Acraman v. Morrice*, 8 C. B. 449; *Bill v. Bament*, 9 M. & W. 36, 40; *Whitehead v. Anderson*, 9 M. & W. 518.

September 17, 1875. WILSON, J., delivered the judgment of the Court.

There was a verbal contract made between the plaintiff, carrying on business at New York, through his agent, Mr. Lyon, and the defendants, at the place of business of the latter, at Orillia, in this country, that the plaintiff should sell to the defendants certain goods, to be forwarded from New York by the plaintiff to the defendants by express. The plaintiff's agent had on the same day, and at the same place, sold goods by another verbal contract to a person of the name of William Tudhope, carrying on business also in Orillia, under the name of W. & J. Tudhope. The goods sold to the defendants and to the other person were by the agreement of the defendants and Lyon, and, as I gather from the evidence, by the agreement of that other person also, to be directed to him under the name of W. & J. Tudhope, Orillia.

The price of the goods was, it appears, the New York prices, and not the price laid down at Orillia.

The parties do not agree where the place of delivery was. The plaintiff contends it was at New York. The defendants that it was to have been Orillia.

The goods ordered by the defendants, and those for W. & J. Tudhope, were sent by the plaintiff from New York in a case addressed, as agreed upon, to W. & J. Tudhope, Orillia; and invoices of the respective purchases were sent to the respective purchasers, which they duly received. The plaintiff said the bargain was, that payment should be made in thirty days after date of invoice. William Tudhope said payment was to be in thirty days after receipt of the goods at Orillia, and the defendants said it was to be cash on delivery at Orillia.

The goods in the one case came to the custom house in this place for the two different purchasers. The goods came here through the American Express Company. They did not do business north of this place. The Vickers' Express Company, through their agent at Orillia, Mr. Miller, about the middle of July, 1874, informed William Tudhope, to whom the case was addressed by the name of W. & J. Tudhope, that goods had arrived for him, and Miller asked for the invoice of W. & J. Tudhope's goods.

By some means not explained, Miller in writing from the invoice transmitted to W. & J. Tudhope, did not copy it truly, for while the true amount was \$37.25, Miller made it \$30.50.

That invoice was presented at the custom house by Mr. Bishop, the custom house clerk of these express companies in Toronto, who paid the duties upon that invoice. Mr. Bishop said he notified W. & J. Tudhope on the arrival of the goods of their arrival.

It appeared that after the duties were paid the case was examined, and the custom house authorities finding a parcel addressed to the defendants, but knowing nothing of the defendants having a separate invoice for them, and thinking an attempt was being made to pass the whole of the goods upon the invoice produced for W. & J. Tudhope only, and seeing so great a difference between the goods in the case and those specified in the only invoice they had, seized the whole for what they believed to be an attempt to defraud by means of a false invoice.

The express agents were informed of that, and Mr. Miller two or three days after he had got the copy of the invoice from W. & J. Tudhope, called upon him for his original invoice, and asked him to get from the defendants their original invoice to send to Toronto. William Tudhope got from the defendants their original invoice, and he gave it and his own to Miller, who forwarded them to the express agent in Toronto.

The express office gave these originals to the custom house officials, the defendants' amounting to \$61.75, and W. & J. Tudhope's to \$37.25, being together \$99, in place of \$30.50 as first stated, and the authorities, being now confirmed in their previous suspicion, forfeited the whole goods and sold them at auction, at which they produced \$81.

*Wm. R. Tudhope*, one of the defendants, said he was not notified of the arrival of the goods in Toronto. I suppose he means by the plaintiff. He said W. & J. Tudhope informed him the goods were there, and he gave the invoice to W. & J. Tudhope because the goods were shipped to him, and it was the only way the defendants could get the goods, and W. & J. Tudhope said the invoice was wanted to be sent to Toronto to pass the goods.

The defendants telegraphed to the custom house or to the Express Company to know why the goods were not sent on, as the defendants were informed they would be, and the answer was, they had been seized and sold.

It is quite clear there was no contract, binding in law, between the plaintiff and the defendants, unless there can be shewn to have been a delivery to and acceptance by the defendants of the goods in question, for it is admitted there was no writing to constitute a contract.

If the plaintiff rely on a delivery and acceptance he must do so upon the following facts:

The sending off the goods from New York addressed to the defendants, and putting them in the case with the defendants' consent, addressed to W. & J. Tudhope, Orillia; the sending to the defendants an invoice of the goods; the payment of duties, as on the whole goods, by W. &



J. Tudhope,—treating him, for the purpose, as the agent of the defendants; the delivery by the defendants to W. & J. Tudhope of their invoice, for the purpose of passing the goods through the custom house; and the application for the goods to the customs authorities or to the Express Company.

The delivery of the goods by the plaintiff to the Express Company, to be forwarded by the Company to the defendants, was not a delivery to the Company or an acceptance by them so as to create a contract under the Statute of Frauds, with respect to the goods between the plaintiff and defendants. The Company were carriers merely, not agents to contract for the defendants: *Hart v. Bush*, E. B. & E. 494; *Hunt v. Hecht*, 8 Ex. 814; *Smith v. Hudson*, 6 B. & S. 431.

The address of the goods to the defendants, and placing them in the case directed to W. & J. Tudhope with the defendants' assent, and the delivery of that case to the express company to be forwarded to W. & J. Tudhope, cannot make a delivery to or acceptance by the defendants of the goods, or by any one on their behalf. It was not a delivery to nor acceptance by the carriers as stated; nor was it a delivery to or an acceptance by W. & J. Tudhope, for the goods were no more in their possession by the delivery of them to the carriers than they were in the possession of the defendants by such delivery.

If W. & J. Tudhope had received a delivery and perfected an acceptance of the case so as to have been binding upon them, I am of opinion that the same would have operated for and been binding upon the defendants as well, whose goods were in the case with their assent, for W. & J. Tudhope would, for that purpose, have been the agents of the defendants as between them and the plaintiff.

I mean, to complete an acceptance which would perfect the contract under the Statute of Frauds, although it may not have been an acceptance which bound the defendants to keep the goods.

For there is said to be a difference between the two kinds of acceptance, and although the acceptance may be such as to bind the contract, it does not nevertheless prevent the purchaser from rejecting the goods for just cause: *Morton v. Tibbett*, 15 Q. B. 428; *Currie v. Anderson*, 2 E. & E. 592, 600; *Smith v. Hudson*, 6 B. & S. 431.

I think W. & J. Tudhope were the agents, or the single person composing that firm was the agent, of the defendants to receive and accept the goods for them so as to constitute a contract, although not to bind the defendants from rejecting the goods for any just cause as opposed to the terms of the contract.

Then, did the person trading by the name of W. & J. Tudhope receive and accept the goods? He and the defendants had each an invoice for the respective parcels of goods. He was notified by the express company of the arrival of the goods at Toronto. He gave his invoice to the express agent to pass the goods for him, and, of course, to pay the dues and to receive them for him.

He got from the defendants their invoice to pass the goods also for them, and, of course, that would be to pay the dues also on their account.

The two invoices were sent down. The dues on the invoice of W. & J. Tudhope were paid on the case.

The customs' department upon that fact, and upon an examination of the contents of the case, and upon the sight of the two original invoices, believed there was fraud in the presentation of the single invoice, and on the payment of duties only on it, while there were other dutiable goods in the case of which they had no notice until an inspection was had, and there was a separate invoice for that parcel of goods which belonged to the defendants; and they seized and sold the goods as forfeited for that cause.

That it appears to me was a dealing both by W. & J. Tudhope and the defendants with the goods, although the defendants do not really seem to have been to blame at all, which shews an assumption of ownership over the goods

which is quite opposed to the ownership of them remaining in the plaintiff. Perhaps neither W. & J. Tudhope nor the defendants were morally chargeable with any fraud, or with any attempt to commit one.

They acted, or at any rate W. & J. Tudhope did, and in my opinion the defendants must share with them the responsibility for their acts, in such a manner that there was apparently an attempt to defraud.

If the goods were lost by the fraud of either of them, they must be held liable for having dealt with the goods as their own, to bring about the consequences which followed.

And if there was no fraud, it was their duty to make that apparent to the customs' authorities.

Instead of doing so, they did nothing after transmitting their invoices to pass the goods, but make some casual inquiry why the goods were not sent forward until they were sold as forfeited.

It was their duty to be more diligent than they or their agents were while the goods were in that position, and they should have informed themselves fully of the whole circumstances affecting the goods. They seem to have taken little or no trouble about them from about the middle of July, when they sent the invoices to pass the goods, and the time when the goods were finally lost by sale, and they never informed the plaintiff of any of these facts.

Now it cannot be doubted but the goods were lost by or through the acts and conduct of the defendants and of W. & J. Tudhope, for whose acts in this respect I think they are answerable, and from the manner in which they dealt with the goods, and from no other cause whatever.

And I am of opinion these facts clearly were evidence of an assumption of ownership of the goods, and a receipt and acceptance of them sufficient to make and complete a contract binding in law, and to take the case out of the provisions of the Statute of Frauds.

A vendee by selling part of the goods he has bought, and his sub-vendee removing part of the goods, although without his knowledge, will make a good acceptance as against such vendee, as between him and the original vendor.

In *Chaplin v. Rogers*, 1 East 192, Lord Kenyon said, p. 195: "Now, here the defendant dealt with this commodity afterwards as if it were in his actual possession; for he sold part of it to another person."

So also where the vendee sold the goods he had agreed to buy, and he sent them to the sub-vendee, who refused to take them as not according to sample, it was held that such a dealing with the goods was evidence of a receiving and accepting of them by the vendee for the original vendor: *Morton v. Tibbett*, 15 Q. B. 428; see also, *Hurst v. Hecht*, 8 Ex. 814.

In *Meredith v. Meigh*, 2 E. & B. 364, it was said that a bill of lading sent to the vendee may be so dealt with by him as the symbol of the property represented by it, that a receipt and acceptance of the goods specified in it may be inferred.

*Currie v. Anderson*, 2 E. & E. 592 is to the same effect

Here the defendants were enabled by the invoice to deal with the goods, and also by the parcel in the case addressed to them. They had it in their power, as had also W. & J. Tudhope, to deal with the goods or not, as they pleased. If they did not wish to take the goods they should have left them alone, and perhaps have advised the plaintiff they had declined to take them. That they did not do; they elected to take the goods; and having done so, and having dealt with them as they did, there was evidence of a binding contract between them and the plaintiff upon the facts proved, which are strong evidence of an actual receipt and acceptance of the goods.

In my opinion the verdict of the jury was quite right, and should have been allowed to stand.

The appeal will be allowed with costs, and the order of



the Court will be that the rule to shew cause and the rule absolute, directing a nonsuit to be entered, shall be discharged with costs.

*Appeal allowed with costs.*

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### RE HOLLAND.

*Conviction--Refusal to hear defendant's witnesses—Mandamus—Certiorari—36 Vic. ch. 43, O.*

The defendant was convicted in July, 1874, under the Public Health Act, 36 Vic. ch. 43, O., of creating a nuisance; the magistrates refusing to hear witnesses for the defence, on the ground that the statute made no provision for such witnesses being called.

*Held*, that an application in May, 1875, for a mandamus to re-open the complaint, was not too late, and the writ was granted; the refusal to hear one side being the same as if the case had not been heard at all.

*Semble*, that a *certiorari* might issue in such a case, notwithstanding sec. 35 of the Act.

May 11, 1875, *Murphy* obtained a rule *nisi* from Mr. Justice Galt, sitting for the Court in vacation, calling on W. H. Norris and George Leslie, two of Her Majesty's Justices of the Peace, to shew cause why a writ of mandamus should not issue commanding them to re-open a complaint and information against Terence Holland, whereby he was charged, on the information of James Sparks and William Hunter with having neglected to obey the order of the Health Inspector; and to hear such competent witnesses on the part of Terence Holland as he might call for his defence and to determine the said charge and complaint after hearing the said witnesses.

The defendant was charged on the oath of Sparks and Hunter, Health Inspectors of the township of York, on the 11th day of July, 1874, for that he, a butcher, having been ordered by the inspectors to keep his slaughter house in a clean state, so as to prevent the said premises being a nuisance and dangerous to the public health and welfare, he neglected or refused to do so, thereby creating an intoler-

able nuisance, and violating the provisions of the Public Health Act 36 Vic. ch. 43, O., and had made himself liable to the penalty therein provided.

The case was heard on the 20th of that month. Several objections were taken by the defendant's counsel at the close of the case for the prosecution.

On the 27th of that month to which day the proceedings stood adjourned, the magistrates made the following note : "The defence proposed to call witnesses, but the Court held that the Public Health Act 36 Vic. ch. 43, Statutes of Ontario, made no provision for such witnesses being called, and refused to hear any. Judgment given for complainants, defendant fined one dollar and costs. In default to be levied on his goods and chattels."

In this Term, in full Court, September 2, 1875, *J. G. Robinson* shewed cause. The motion is too late, the application for the writ being in May, 1875, while the conviction was in July, 1874 : *Regina v. Townsend*, 28 L. T. 100 ; *Regina v. The Recorder of Richmond*, E. B. & E. 253 ; *In re Pratt*, 7 A. & E. 27 ; *Rex v. Inhabitants of Frieston*, 5 B. & Ad. 597 ; *Rex v. Justices of Cambridgeshire*, 1 D. & R. 325 ; *Rex v. Justices of ———*, 1 Chitty 164. The 35th section of the Act shews the case is not removable by *certiorari* : *Rex v. Justices of West Riding of Yorkshire*, 1 A. & E. 563.

*Murphy* supported the rule. A *certiorari* was applied for soon after the conviction. The case was heard, and after remaining some time over for judgment the application was refused by the Chief Justice of this Court a short time before the present rule was obtained. The defendant has ever since the conviction been taking proceedings to dispute it, and it can not be said he has acquiesced in it. The refusal to hear a defence was a ground for interference of the Court as a matter of right.

September 17, 1875. WILSON, J.—In *Tapping on Mandamus*, 291, it is said "There is no limitation of time within which an application for a mandamus need be

made, except that it should be made within a *reasonable time*." That reasonable time, from the instances there given, has not by any means elapsed in this case.

In *Regina v. The Recorder of Richmond*, E. B. & E. 253, it was said there was no fixed rule of practice as to the time within which an application for a mandamus to the sessions to enter continuances and hear an appeal must be made, and the Court apparently in accordance with *Corner's Practice* on the Crown side, 219, declared that in future application must be made within the term after the decision of Sessions, unless special circumstances appear by affidavit to account for the delay to the satisfaction of the Court.

The Court will not interfere when the magistrate has determined that some evidence is not admissible: *Rex v. Justices of Cambridgeshire*, 1 D. & R. 325; *Rex v. Justices of Carnarvon*, 4 B. & Al. 86.

But, as Mr. Justice Holroyd said in the last case, at p. 88, "If it had appeared in this case that the sessions had heard one side, and had altogether refused to hear the other, I should have thought it the same as if the case had not been heard at all, and I should then have been of opinion that the mandamus ought to issue."

It is a principle and rule of the first consequence, in every system of jurisprudence which assumes to decide fairly the rights of a controversy, that both parties shall be heard. Here the magistrates have refused to hear witnesses for the defence because the statute "made no provision for such witnesses being called."

The plain rule is, that the witnesses, in the absence of any provision expressly taking away the right to examine them are admissible as a matter of unquestionable right. But if the statute did provide that the accused should not be allowed to call witnesses the enactment would be valid in law, but it would be an outrage upon justice. We cannot suppose that such a law could or would ever be passed by our Legislature.

I think the delay has been sufficiently accounted for, and that the rule must be absolute. I am inclined to think

that a *certiorari* might have issued in this case notwithstanding sec. 35 of the Act, because it was not for the purpose of review properly the application was made, but in order to be assured that the justices were proceeding in a manner warranted by and not contrary to law, and because the conviction which has been made is entirely without jurisdiction: *Regina v. Justices of St. Albans*, 17 Jur. 531; *Regina v. Commissioners, &c., of Cheltenham*, 1 Q. B. 467; *Regina v. Aberdare Canal Co.*, 14 Q. B. 854; *Regina v. Rose*, 1 Jur. N. S. 802; *Regina v. Wood*, 5 E. & B. 49; *Regina v. Sheffield, Ashton-under-Lyne and Manchester R. W. Co.*, 11 A. & E. 194, 200, 201; *Regina v. Flannigan*, 32 U. C. R. 593.

MORRISON J. concurred.

*Rule absolute.*

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## HENRY V. MITCHELL ET AL.

### *Interpleader—Trespass—Damages.*

An execution was issued from the Division Court on the 1st February, and received by the bailiff on the 3rd, when the horse in question was seized. The plaintiff having claimed it, an interpleader summons issued, and the trial was fixed for the 3rd March. It was only partly heard on that day, and adjourned on the plaintiff's application. The horse when seized was given by the bailiff, at the plaintiff's request, to one A. who kept it. On the adjournment it was ordered to be given to the plaintiff, on her giving security, and A. gave the security, but kept the horse in his own possession. The interpleader suit was tried on the 7th May, and the plaintiff succeeded in it—after which she brought this action of trespass. *Held*, that she was entitled to recover damages for the detention of the horse down to the 3rd March, until which time A. held it for the bailiff; but not after that time, for the order then made that she should give security, as a condition of getting the horse back, was the act of the Judge, for which defendant was not responsible.

On the 6th February the defendant wrote to the bailiff instructing him not to seize a particular horse mentioned, and they contended that as on receipt of this letter the bailiff should have given the horse up, they were not liable for its further detention. The evidence shewed that the horse seized was not the one mentioned in the letter; but *Seemle*, that if it had been, defendants would still have been liable for the continuance of the wrongful seizure which they had authorized.

APPEAL from the County Court of the County of York.



The declaration contained counts in trespass to goods, and in trover.

Mitchell pleaded separately, "not guilty" and "not possessed," and the other two defendants pleaded together the like pleas. Issue.

One question at the trial was, whether a horse, which the plaintiff, a married woman, claimed as her separate property, was her property or not. The jury found it was her own separate property. That fact was no longer disputed by the defendants.

The other facts appeared to be as follows: Mitchell had a judgment in the Division Court against Thomas Henry, the husband of the plaintiff. On the 29th of January, 1873, a letter was written to the bailiff of the Division Court, in the name of the professional firm resident in Toronto who were acting for Mitchell, by a clerk of the name of Manly, who was then in their office as a student at law. The letter stated: "Mitchell v. Henry. An alias writ of execution will be transmitted from the clerk here to-day. Under it we instruct you to seize all the goods, furniture, &c., about the defendant's place, whether claimed by the wife or not. Your course is then to interplead. We hereby require you to act without delay."

On the 1st of February, 1873, an execution issued on the judgment from the Division Court in Toronto, and was sent by Mitchell's attorneys to the bailiff of the Division Court at King.

On the 3rd of February the bailiff seized, among other goods, upon the horse, which was claimed by Mrs. Henry. He had then two executions against Thomas Henry in his hands at the suit of other creditors; and he said, "I think the seizure was on an execution of Mitchell, dated 1st of February, 1873, and I had two others, not the same plaintiff."

The execution of Mitchell came to the bailiff's hands, he said, "I think, through the post from Toronto the evening of the day I had seized the horse."

On the 3rd of February the bailiff at Lloydstown wrote

to Mitchell's attorneys: "Mitchell v. Henry, the execution mentioned in your letter of the 29th ult. has not yet come to hand. You will please inform Mr. Howard. Examine chattel mortgage, and let me know if it will stand being tested."

On the 6th of February Mitchell's attorneys wrote to the bailiff: "Mitchell v. Henry: The card you sent shews there was at least one error in your return to the execution. We now instruct you to seize, under the alias writ, all the defendant's goods not included in his chattel mortgage to Mr. Fairfield; that is to say, all but one light bay horse, named 'Joe,' one Democrat waggon, one carriage, known as a phaeton, one cutter, and one set of single harness. You can then interplead."

Mrs. Henry was from home when the seizure was made. So soon as she returned she claimed the horse from the bailiff; that was on the 6th of February.

On the 11th of February she issued an interpleader summons. The clerk of the Court at Lloydtown sent a copy for Mitchell to his attorneys, asking them to accept service.

On the 12th of February Mitchell's attorneys wrote to the Clerk of the Court, accepting service for Mitchell.

The trial of the interpleader was fixed for the 3rd of March. On that day, after the case was partly heard, it was, as Mrs. Henry had not put in a written claim, postponed at her instance.

The horse, when seized by the bailiff, was given by him to Mr. Atkins, at Mrs. Henry's request, and kept by him at his farm for the bailiff.

On the adjournment of the interpleader case on the 3rd of March the horse was ordered by the Court to be given to Mrs. Henry upon her giving security for it, or on payment of the execution, and all fees and charges. Atkins then gave the security for the horse, but he kept it in his own possession for his own security.

On the 24th of March Mitchell's attorneys wrote to the clerk of the Court at Lloydtown, "Mitchell v. Henry: The

defendant has been here seeking our consent to a change of bondsman, from Atkins to Fairfield. We will consent to the goods being given up to the defendant upon Fairfield giving his bond to pay the debt by the 5th of May. If the security cannot be given, let the matter stand as it is."

On the 27th of March Henry wrote to Mitchell that he had got a letter from the clerk of the Court, saying that he (Mitchell) wanted Mr. Fairfield to come good for the debt. Henry wrote, that all he wanted was Atkins changed to Fairfield to save expenses, and that he (Henry) might have the use of the horse until the Court day.

On the 28th of March he wrote somewhat to the same effect to Mitchell's attorneys; and again on the 3rd of April.

On the 7th of May the interpleader suit was tried before the Deputy Judge, and according to the affidavit of Mr. Durand, filed against the motion for a new trial, the decision was in Mrs. Henry's favour, that the horse was her property.

The horse which the bailiff seized was "one horse—colour, sorrel—cream mane and tail."

A question was made at the trial whether the letter of the 29th of January, 1873, was one for which the two attorneys in the action could be held liable.

The evidence was, that it was written by a clerk in the office of Mitchell's attorneys. The letter of the 6th of February was written by the same clerk.

*Mr. Ewart*, one of the attorneys sued in this action, said: "I was not aware that the first had been written. I recollect, and was aware of the second one. I do not think that any one authorized the first letter to be written. The letter of the 6th of February was written by my instruction. Manly, the clerk, who wrote these letters, had not the management of the Division Court case. I had the management of the case myself. The letter of the 24th of March, 1873, is in the handwriting of defendant Downey. Letter of 29th April is my writing. Letter of 12th February was written by Manly. I received the postal

card of the 3rd of February, 1873, from Pottage. It was after that I authorized the letter of the 6th of February to be written to Pottage."

After the plaintiff's case at the trial in the County Court was closed, *McMichael*, Q.C., on behalf of the two professional gentlemen who were sued in the action as Mitchell's attorneys for the part they took in the Division Court proceedings, moved for a nonsuit on the ground that there was no evidence against them, inasmuch as the bailiff had not personal possession of the execution of Mitchell at the time of the seizure made, and also because it appeared the plaintiff was not the owner of the horse, as the note she gave for its price was outstanding, and her husband was liable upon it.

The learned Judge, as to the first objection, ruled that, as the execution had actually issued, and was on its way to the bailiff through the post at the time of the seizure, and as the bailiff professed to seize under it, and did subsequently detain under it, there was evidence for the plaintiff to go to the jury. And he over-ruled the last objection.

Mr. *Ewart*, for the defendant Mitchell, made the like motion, on the ground first taken for the other two defendants as above stated.

The learned Judge ruled there was evidence for the jury of Mitchell having seized and detained the horse by the acts of his attorneys, and by urging his claim to it, until he should be paid his debt. Evidence was given for the defence.

The direction to the jury was as follows : Was the horse the property of the plaintiff at the time of the seizure ? If not, verdict for defendants. Was it seized and detained on Mitchell's execution, through the interference of the two defendants, the attorneys of Mitchell, or either of them ? If so, then both or one, as so found, would be liable to the plaintiff, as would also Mitchell for the acts of his attorneys.



The note of the charge then reads as follows : " I asked the jury to find independently, as a fact, whether or not the defendant Mitchell personally interfered in promoting the interpleader proceedings on his own account to retain the horse ; telling them that his merely availing himself of an interpleader obtained by officer Pottage for himself, not obtained or had at the instance of Mitchell or his attorney, would not be any evidence of such interference or any evidence to his, Mitchell's, prejudice. With respect to damages, in case of a verdict against the defendants or any of them, there would be the amount of the expenses reasonably incurred by the plaintiff in endeavouring to cure the horse of maladies and injuries occasioned by improper treatment, and for loss of his services during the actual time she was deprived of his use ; and for the depreciated value occasioned by improper treatment of the horse while it was so detained from the plaintiff. Mr. *Ewart* objects that I should have told the jury that the seizure was not made under Mitchell's writ, and that defendants should not be liable after the 6th of February. Also, that I told the jury that they might allow for damages, loss of time of horse, because the plaintiff was entitled to the horse from the 3rd of March ; and there was no evidence as to the state of the horse at that time ; and for telling them that they might find it reasonable for the clerk to have acted in this matter for the two attorneys who were sued in this action, in whose office and employment he had been, so as to make the act theirs. Dr. McMichael now desires to raise the question of the right of the plaintiff to bring this action after the fact of an interpleader issue having been had between Mitchell and the now plaintiff. I decline to entertain this question here at this stage of the proceedings."

The verdict was for the plaintiff against all the defendants, and the damages were assessed at \$150, and " The jury found also as a fact that the defendant Mitchell did interfere personally in detaining the horse after its seizure on his execution, being aware of it as inferred from his letter of the 28th of March."

The defendants obtained rules in the Court below calling on the plaintiff to shew cause why the verdict should not be set aside and a nonsuit be entered on leave reserved, or a new trial granted on the ground of misdirection and non-direction of the learned judge who tried the cause, in the following respects :—that the learned Judge should have told the jury—

1. That the seizure was not made under the writ issued by the defendant Mitchell, or under the authority or direction of the defendants.

2. That the defendants were not liable for anything done after the bailiff had received the letter of the 6th of February.

3. That at all events he should have told them that the defendants were not liable for anything done after the 3rd of March, when the horse in question was ordered to be given up to the plaintiff.

4. That if it were reasonable for the clerk in the said attorneys' office to write the letter of the 29th of January, it would bind the defendants; but he should have told the jury that the letter would not bind the defendants unless the writing of it was within the scope of the authority of the said clerk.

5. That the learned Judge should not have told the jury that the measure of damages should be all the expenses incurred by the plaintiff by reason of the seizure and detention of the horse during the whole time from the seizure, until the interpleader suit in May, and for the loss of the use of the horse during that time.

Or on the ground that the verdict was against law and evidence and the weight of evidence, or on the ground that the damages were excessive.

Both rules were afterwards discharged.

The defendants appealed to this Court, for the following reasons :

1. On the ground of misdirection and non-direction by the learned Judge, before whom the case was tried, in the respects set forth in the rule nisi for a new trial granted by the said Judge.

2. Because the verdict was against law and evidence and the weight of evidence.

3. Because the damages awarded at the said trial were excessive.

August 30, 1875. The appeal was argued by *MacLennan*, Q. C., for the appellants. The writ of Mitchell was not in the bailiff's hands at the time when he seized the goods in question. He had two other executions then in his hands, and he could only have seized upon them. The letter of the 29th of January, if it can be held to bind the attorneys for Mitchell in the Division Court cause, was not an authority to seize without an execution, but an instruction to the bailiff that when the execution was transmitted to him he should seize *under it* all the goods about Henry's place, whether they were claimed by the wife or not. "We hereby require you to act without delay," contained in that letter, can only mean when the bailiff is in a situation to act under the writ. The letter referred to, however, is not one which binds any of the defendants; it was written by a clerk in the attorneys' office, but it was written without the knowledge and without the instructions of any of his employers, and he had not the management of that cause; one of the principals himself attended to it. It may be said the same clerk wrote the letter of the 6th of February, on the same subject and to the same person; but that letter was written under the special direction of Mr. Ewart. If the letter referred to is binding on the attorneys, it is of no consequence whatever if the seizure was not made till after the 6th of February, for the letter of that date then superseded the former letter; and the letter of the 6th of February, was expressly not to seize the light bay horse name "Joe," which is the horse in dispute. If the letter of the 29th of January is not binding on the attorneys, then the letter of the 6th of February is the first direction which was authorizedly given to the bailiff, and it is of no consequence if the seizure were

made before the bailiff got it; and if he seized after getting the letter, still he was not to seize the horse called "Joe." If the defendants are liable for the seizure, it is an important question to determine what it is they are responsible for—that is, the extent of their responsibility. The plaintiff contends the defendants are liable for everything which happened to the horse, and for the loss of service of the horse from the day of seizure up to the very day of its restoration to the plaintiff; but the facts must be looked to in order to ascertain correctly the extent of that liability. The seizure of the horse, if it is really the one which the plaintiff claims, and a different horse from the one called "Joe," may have been about the 3rd of February. On the 6th of February the plaintiff claimed the horse from the bailiff, and she requested him to take it from the tavern stable, where he then had it, and to leave it with Mr. Atkins, a farmer close by, which the bailiff did. From that time Atkins had the horse for the plaintiff, and it was just the same, so far as the bailiff and the defendants are concerned, as if the horse had been given over then to the plaintiff herself. The horse remained with Atkins in that way until the 3rd of March, the day of trial of the interpleader. The interpleader was on that day partly tried, and the trial was postponed at the plaintiff's request until a later day, and no trial took place till the 7th of May, when the decision in the interpleader was given. If the plaintiff can recover damages for a wrong done to her, continuing after the 6th of February, the day the horse was so given to Atkins, she cannot recover damages in respect of any time after the 3rd of March, when the interpleader trial was postponed at her own request, and more particularly as the Judge then specially ordered that the adjournment should be made "on the claimant's giving security for the forthcoming of the goods or the payment of the plaintiff's claim and costs, and also of the bailiff's fees and charges for the keep of the horse—goods to be delivered up to claimant on such security being given"—for the delay was occasioned by her own want of readiness to try the cause. And besides,



as the Judge, in the course of his judicial duty, made the order that the plaintiff should get the horse only upon giving security, the defendants cannot be made liable for the detention of the horse from her until the security was given, or after it. That was one of the terms of granting her request to adjourn the cause: *Lock v. Ashton*, 12 Q. B. 871. After Atkins gave the security it was a matter between him and the plaintiff about his keeping the horse for his security. In no way can the plaintiff recover damages down to the time of the interpleader trial in May; and because the Judge has directed against the defendants in that respect, they are entitled to relief. The damage, or the principal damage said to have been sustained by the horse may have been after the 3rd of March. The defendants contend, if they are liable at all, that they are not liable for damages after the 6th of February, when the horse was delivered to Atkins at the plaintiff's request: *Brown v. Beatty*, 35 U. C. R. 328. He also cited *Wilson v. Tumman*, 6 M. & G. 236; *Macklem v. Durrant*, 32 U. C. R. 98; *Woolen v. Wright*, 1 H. & C. 554.

*Durand*, contra. It is said no seizure was made under the execution of Mitchell, because it is said the bailiff had not the writ when he made the seizure. But the letter of the 29th of January is a direction to seize, as the execution was coming out. The horse, before the 3rd of March, was certainly not held by Atkins for the plaintiff, for Atkins expressly says he held it only for the bailiff, and the bailiff would not allow him to give it to the plaintiff. He says, in fact, he kept the horse all the time for the bailiff, who gave him express orders not to give it up without his direction; and he did not give it up till after the interpleader order, and then only on the bailiff's order to do so. Mitchell said he knew the horse was kept by and for him, and all the defendants exercised a control over it. They all refused to allow the security of Mr. Fairfield to be taken in place of that of Atkins, unless Fairfield would agree to pay the debt of Henry, the husband; that is, unless the plaintiff abandoned everything. The inter-

pleader suit does not prevent the party injured from recovering damages : *Harmer v. Gouinlock*, 21 U. C. R. 260 ; *May v. Howland*, 19 U. C. R. 56. If the plaintiff can recover damages only to the 3rd of March, the evidence shews the horse was or may have been injured to the extent allowed for before that day. As to the authority of the clerk to write the letter of the 29th of January, it is plain he was acting in the scope of his authority. He was a clerk in the office, and clerks manage business of the kind. Besides, he wrote in this very case the letters of the 6th and 12th of February. The jury found he had authority to write the letter, and the defendants cannot now repudiate it : *Green v. Elgie*, 5 Q. B. 99, 124 ; *Patteson on Attorneys*, 268 ; *Baker v. Black*, 8 L. T. 393. The horse now in question is not the one called "Joe," because that was described to be a "light bay horse," while the one the bailiff seized, he said, was "a sorrel horse, with cream coloured mane and tail." If the evidence be not very plainly taken down on that point, there was no dispute that both parties were speaking of and contesting about the same horse, and that was the one the bailiff seized, and that one was not "Joe."

There was some evidence that the seizure was made while the bailiff had Mitchell's execution in his hands. But if it was made before he got it, still, if he seized under a direction from the attorneys to do so, on the assurance than an execution would be issued, the defendants are liable for such act, by reason of the illegal direction given. And if he seized for Mitchell and other defendants, and they afterwards adopted his act, they will be liable for the seizure.

As to damages, he referred to *Lough v. Coleman*, 29 U. C. R. 367 ; *Appleton v. Lepper*, 20 C. P. 138 ; *Mayne on Damages*, 2nd ed., 457.

The plaintiff's actual damages exceed very considerably the amount for which the verdict was given.

*Maclennan*, Q.C., in reply. The evidence does not shew that two horses had ever been seized, but only one horse, and the only horse that is spoken of in the evidence from

first to last, is the horse "Joe," and that horse the bailiff had distinct directions not to seize.

September 17, 1875. WILSON, J.—The first point relied upon was, that the seizure was not made under the writ of Mitchell, because it was said the bailiff had not the writ at the time of the seizure.

The evidence upon that fact is not very clear. The writ was issued on the 1st of February. The bailiff at first said he seized on the 2d of February. Then he said it might have been on the 3rd. At last he said he seized the horse, by the memorandum he had, on the 3rd. He did not seize on the 2nd, I presume, because, I find, that was a Sunday.

I think it may be taken as proved that the seizure was on the 3rd of February.

Then as to the writ being or not being in the bailiff's hands at the time of the seizure, he said: "I think the seizure was on an execution of Mitchell's, dated 1st of February, 1873, and I had two others not the same plaintiff. At the time of the seizure I think I had Mitchell's execution in my possession. I had two other executions against Mr. Henry. I think the Mitchell execution came to my hands through the post from Toronto the evening of the day I had seized the horse. I had been expecting this execution. I seized the horse, I find by my memorandum, on the 3rd of February. I had then the execution of Mitchell. I held the horse, and interpleaded on it upon Mitchell's execution. I completed the seizure on the three writs—Mitchell's and two others—and the interpleader was on Mitchell's execution."

The plaintiff was not at home upon that day, but it is said she came home on the 6th of February, and then she claimed the horse, and that may perhaps account for the bailiff's endorsement upon Mitchell's writ, which is *verbatim* as follows: "Seized the undermentioned goods and chattels on Thursday, the 6th of February, 1873—piano-forte, five chairs, small walnut bureau, two stoves, pine

sofa, washstand, five pictures, two looking-glasses, one horse, color sorrel, cream mane and tail. E. E. Pottage, Bailiff."

Whether he seized on the sixth, as the memorandum states he did, or as he says in his evidence, he *completed* the seizure on the three writs, that is on the sixth, and did not seize at all on the third, or did not complete it on that day, and only completed it on the sixth, is in no way clear. He wrote the postal card of the 3rd of February, I think, although he says he had no recollection of sending it. In that card he wrote to the attorneys the execution mentioned in their letter of the 29th of January "has not yet come to hand." That may be quite correct, for in his evidence he said he got the writ on the evening of the day he seized, which he said was on the third.

I think there is no doubt that the bailiff did get the writ on the 3rd of February. It was issued on the first. There was a hurry and pressure about it. Mr. Ewart, although examined as a witness, did not say when it was sent off, whether on the first or third. If sent off on the first, the bailiff at Lloydtown would certainly get it on the third. And even if it were not sent till the third, he might probably get it on the same day.

Then did he seize upon it? He says positively, more than once, that he did, and that he had, at the time of the seizure, and he certainly made a return on it to that effect. Mitchell's acceptance of an interpleader issue with the plaintiff is not evidence of being a trespasser by the Bailiff's Act: *Woolen v. Wright* 1 H. & C. 554.

That question was left directly to the jury, and they found it adversely to the defendants. The learned Judge below thought that finding was correct, and we see no reason to complain of it.

The second exception taken is, that the defendants are not liable for anything done after the bailiff had received the letter of the 6th of February.

The meaning of that, I suppose, is, that in that letter the attorneys direct the bailiff not to seize the light bay



horse called "Joe." And as the defendants say that is the horse which was seized, the bailiff should have given it up on the receipt of the letter. And if he did not, or as he did not, the defendants are not liable for his further detention of it.

It would not follow that the bailiff's refusal to obey the directions of the defendants in undoing a wrongful act done and begun for them, would excuse the defendants from a continued liability for his wrongful conduct, committed after their orders to stay that wrong. He was their agent. They put him in motion. The plaintiff has a right to look to those who took her property for all the consequences until she gets it restored to her.

But there is no use in discussing such a point, for I am of opinion the book before us shews it was not the horse "Joe" which was seized, but a different horse. No such question was made at the trial, for if it had been it could have been cleared up on the spot.

The bailiff's return shews a different kind of horse was seized by him than the one he was directed not to seize. A light bay horse is a different one from a sorrel horse with cream mane and tail. We entertain no doubt on this point.

The third and fifth objections are of the same nature, and we shall dispose of them together at the close of the case.

The fourth objection was, that the letter of the 29th of January should not have been received in evidence, as it was written unauthorizedly by Mr. Manly, a clerk in the office of the attorneys of Mitchell.

That letter is of no consequence one way or the other. It was only a direction to seize generally under the writ to be sent. And the transmission of the writ had the same effect.

If the letter had been a direction to seize at once without regard to whether the bailiff had a writ or not, it would be material to determine whether the clerk had authority to write it or not, in case the bailiff had seized without having the writ.

But as the evidence shews he did seize in fact under the writ, the letter can be of no consequence even if it had ordered a seizure to be made without a writ. The letter, however, does not sanction so wild an act. It expressly says an execution will be sent, and the bailiff is to seize *under it*—that is, of course, when he gets it. There is no cause of complaint, properly, existing from the reception and use of that letter. Manly, besides, had authority to write it, and the jury so found: *Hemming v. Hale*, 7 C. B. N. S. 487.

The other grounds, that the verdict was against the law and evidence, and the weight of evidence, and that the damages are excessive, have thus all been disposed of, excepting in so far as such matters may be covered by the third and fifth objections, which remain to be considered.

The third objection is, that the Judge should have told the jury that the plaintiff could not recover for anything done after the 3rd of March, when the horse was ordered to be given to the plaintiff.

And the fifth objection is, that the Judge should not have told the jury that the measure of damages was all the expenses incurred by the plaintiff by reason of the seizure and detention of the horse until the interpleader suit was determined, and for the loss of the use of the horse.

These objections are to the effect, to what time should the damages have been computed?

The learned Judge's direction was in effect that the plaintiff was entitled to be compensated down to the time the horse was restored to her.

The plaintiff is certainly entitled to damages down to the 3rd of March, for Atkins held the horse during that time, as he says, for the bailiff—indeed he says he held the horse up to the time in May when it was given back to the plaintiff for the bailiff, who told him not to restore it to the plaintiff without his (the bailiff's) orders. Upon the 3rd of March, by the order of the Judge, the plaintiff was to get her horse again, on giving security for the

horse being forthcoming when it was wanted, or on payment of the debt and all costs. That security Atkins gave, but he kept the horse, very likely for his own security, and also by the direction of the bailiff.

That order was made as a condition for further time being given to the plaintiff in the interpleader suit, and it was a judicial order in the cause, the act of the Judge and not of the bailiff or party.

If a magistrate, on the hearing of a complaint, remand the party in custody till a future day, that being a judicial act of the magistrate is not an act of trespass for which damages as a trespass can be recovered against the prosecutor: *Lock v. Ashton*, 12 Q. B. 871.

In that case, it is said by Erle, J., at p. 875, "If the arresting were a trespass, and the remand were ground only for an action on the case, the same course of prosecution would be trespass on Saturday, and case on Monday," to which the counsel for the defendant assented.

And Lord Denman, C. J., said, at p. 876: "But, if the remand here is considered as the independent judicial act of the magistrate, it will be difficult to say that the defendant is liable in this form of action;" and in giving judgment, he said, "The verdict in this case cannot be sustained, the action being trespass, and the jury having given damages, not only for the trespass in arresting, but for the remand, which was the act of the magistrate."

That case, at most, is a decision that the damages for and during the remand, are not recoverable in an action of trespass; and it is in effect a decision that such damages may be recovered in an action on the case. The rule certainly is, that for judicial acts the party who is found ultimately in the wrong is not liable unless he has acted maliciously and without reasonable or probable cause. It cannot be said the defendants are chargeable with that.

I refer also to *Attwood v. Taylor*, 1 M. & G. 279; *Walker v. Olding*, 1 H. & C. 621.

The order of the Court on postponing the trial was in effect that the plaintiff should not get the goods until she

gave security for their return, or for payment of the debt. She gave security. The surety detained them from her for his security; that was as between themselves on an implied agreement proper enough.

If the parties are willing to agree on an amount as damages, the verdict can be reduced accordingly. If they cannot agree, there must be a new assessment made. Whether the jury will restrict their next assessment if they find for the plaintiff, may be a question.

The plaintiff was rather hardly dealt with. She tried time and again to get her property from the defendants, and to change the security given for it, but they would not agree to it unless she consented to agree to pay the debt; that is, unless she would abandon all her own rights, and pay the debt of another person, while those rights were still in controversy.

It was a little hard also, after the interpleader trial was decided in her favor, to compel her to prove her property in the goods over again.

The merits appear to be with the plaintiff, and it may be well for the defendants, if they find they have made a mistake, to settle the matter, than to prolong a controversy which is so likely to end unfavorably for them. It will also be well that the plaintiff should consider that she is not likely to gain personally by further litigation.

The appeal will be allowed without costs, and the order will be, that the rule absolute be discharged, and that the rule to shew cause in the Court below be made absolute on the ground of misdirection as to the damages, and that the rest of the suit be discharged with costs, to be paid by the defendants.

If, however, the parties do agree within one month as to the amount, the damages shall be reduced to that amount, and the rule in the Court below shall be discharged without costs.

*Appeal allowed without costs.*



## RE NORTH VICTORIA ELECTION.

*Contested election—Rejected votes—Evidence of the intention of such voters—Proof of agency—Corrupt practices.*

The decision of Wilson, J., 11 C. L. J. N. S. 163, affirmed on appeal. The petitioner upon a scrutiny of the ballots having a majority in his favour, it appeared that the names of eighteen persons upon the last revised assessment roll, and entitled to vote, were omitted from the copies of voters' lists made for the purposes of the election, and their votes were rejected by the Returning Officer. Eight of them tendered their votes for the petitioner at the poll, and four others made affidavits that they wished to vote for him, which they left with the Returning Officer. The other six tendered their votes, but did not say for whom, but there was evidence that they declared at the poll, though not to the Returning Officer, that they would have voted for the petitioner.

*Held*, no ground for setting aside the election; for that it was competent to receive the evidence showing how they intended to vote, and it was clear therefore that their rejection had not affected the result.

*Held*, also, upon the evidence, that one Peters was properly held not to have been an agent of the petitioner; and that the dinner given by him to forty electors at a distant polling place in the winter, where there was no inn, was not shewn to have been corruptly given or accepted, nor was there sufficient evidence that these persons all voted at the election.

APPEAL from the decision of Wilson, J. The petition—which was one filed by Hector Cameron, Esq., under the Controverted Elections Act, 37 Vic., ch. 9, D., to unseat the sitting member, James Maclellan—was tried at Lindsay on the 13th, 14th, 15th, and 16th of April, 1875, and the argument was concluded on the 24th of April, and the judgment given on the 4th of May.

The respondent's majority was 3.

The judgment in the case below is fully reported in 11 C. L. J. N. S. 162. The learned Judge is there reported to have been of opinion that where the names of certain voters who were entitled to vote at the election appeared on the last revised assessment roll, and should have appeared on the copies of voters' lists, as furnished to deputy-returning officers, but were omitted from such lists, and these voters tendered their votes to the deputy-returning officers, and some of them stated that they desired to vote for the petitioner—that these votes must be counted for the petitioner, if it was clear that they tendered their

votes and intended to vote for him; and at all Courts that their rejection was no ground for setting aside the election, as it could not have affected the result. He was also of opinion that on the facts, which are fully set out in the judgment in this report, that one Peters was not an agent of the respondent, and that the giving of certain free dinners by Peters to voters was, under the circumstances, not a corrupt act.

The facts are fully referred to in the judgment appealed from, and are therefore not repeated here.

May 31, 1875.—*The Attorney-General and C. Robinson*, Q. C., for the respondent. The names of 17 or 18 voters who were by law entitled to vote were omitted from the lists, and they were thus deprived of their votes. The number is material, as it might affect the result. The statute does not say what shall be the effect of these omissions. When the number of omitted votes cannot affect the result, then their not being allowed to vote may possibly be considered not of sufficient consequence to set aside the election. But when the number is sufficient to affect the result the election must be declared void, and the question how the voters rejected intended to vote cannot be enquired into or legally ascertained. The policy of the law is in favour of secret voting, and the courts ought to administer the law so as to secure it. It is as important to do this as to secure an election without bribery. If one voter be bribed, the election is avoided, though there may have been a majority of hundreds, and it cannot possibly have had any influence on the elections. That is because bribery must at all sacrifice be put down. It is as important to secure secret voting, and the election should be avoided rather than sacrifice this object, and allow the intention or opinions of rejected voters to be enquired into, or acted upon. Evidence, therefore, for whom the parties whose votes are excluded *wished* to vote is not admissible. The object is to protect the voter in his free right to vote, and he may be induced to *say* openly he would vote one way whilst if left to the free exercise of his right he

might vote another: *Hackney Case*, 2 O'M. & H. 76, 82. It, therefore, not being possible properly to ascertain for whom these parties intended to vote, the election must be set aside.

Assuming Cameron is seated by a majority of 3. The 18 voters were not allowed to vote; 8 of the 18 tendered their vote for the petitioner; 4 others said they put them in afterwards; 6 more tendered their votes, but did not say for whom they intended to vote. A tender implies that there is some person who can receive the vote to whom it is tendered. But no person, under sec. 72, sub-sec. 3, is allowed to communicate any information, obtained at the polling place, as to the candidate for whom any voter at such polling place has voted or is about to vote. And under sec. 77 no person who has voted at any election shall in any legal proceeding question the election or ever be required to state for whom he voted. The voter should be allowed to vote in perfect security. Suppose an agent or canvasser, to be in the booth and have influence on the voter, how can he be free in tendering his vote? There is no provision for striking off voters, but votes may be struck off. See *Boston Case*, *Malcolm v. Parry*, L. R. 9 C. P., 610. The judgment of Brett C.J., p. 619 shews how the votes are to be struck off in case of there being votes tendered by the friends of a candidate who cast their votes. Suppose a person absolutely disqualified voted, if you do not know for whom he voted, how can you strike his vote off. The public have the right to have the votes taken in a certain way, and if not so taken, the election should be set aside. The voter cannot waive his right to use the ballot and have his vote recorded as a *vivâ voce* voter.

Forty voters had dinners given to them by one Peters, who supported Mr. Cameron. The respondent is entitled to have forty votes struck off from the number of those who voted for Mr. Cameron, on account of these bribed voters, or to have the election set aside. Peters's evidence shews that dinners were ordered for forty—forty men to be dined—they were to get their dinners there. 37 Vic. ch. 9, sec.

94, D., has two parts. The latter part refers to the giving of meat, drink, or refreshments to any voter on account of having voted, or any money or ticket to procure refreshments, &c., and enacts that any contravention of the section shall be deemed an unlawful act, and the person so offending shall forfeit \$10. Sec. 98 in effect makes this a corrupt practice. No similar provision exists in the English Act. By the 101st section corrupt practices render the election void. If committed by Cameron's agent it avoids the election. See *Leigh & LeMarchant*, 2nd ed., 22. The votes should be struck off.

As to Peters's agency. Notices of a meeting were sent to Peters by Mr. Cameron to distribute. It does not appear that Mr. Cameron employed him further than sending him the notices. If the corrupt acts were done by others acting for Cameron it is the same as if he did them himself. The meeting for which the notices were given was held. Peters attended, and it is not denied the notices were sent to him. Cameron said he was sorry the people could not get their free dinner. Peters said, "May I do it." Cameron said he could not prevent him. Having expressed his wish the people should have their dinner, and knowing Peters was about to get it for them, he did not actively interpose to prevent him doing so, and thus in name objecting yet really desiring it, he must be held to have authorized it, and therefore be responsible. Cameron had all the benefit of these illegal proceedings by Peters, who was acting for Mr. Cameron to assist him, and Cameron had all the benefit of his agency though he might not recognize him as agent. As to agency see *Lichfield Case*, 1 O'M. & H. 22, 25, observations of Willes, J; *Staleybridge Case*, Ib. 66, 67, 68, by Blackburn, J.; *Blackburn Case*, Ib. 198, 200, by Willes, J; *Galway Case*, 2 O'M. & H. 47, by Keogh, J; *Wakefield Case*, Ib. 100, 102. *Boston Case*, 2 O'M. & H. 161, 167. The giving of dinners is an act within the spirit of the law, and ought to be discountenanced. Peters no doubt could be sued for the penalty. See *Leigh and Le Marchant*, 2nd ed. 44, where the



*Galway Case* is referred to in a note. It is not necessary to prove for whom the party voted. Mr. Cameron's own evidence, as to *agency*, was, "I said I could not prevent him if he chose to do it, but I did not want him to do it." But he really wished the people to get their dinners. The act complained was in its nature calculated to corrupt the voters. It was no part of the duty of the candidate to provide dinner for a voter. The voter must feed himself when he is going to an election as well as when at home on his own farm, and the candidate if permitted through his agent to provide meals for the voters gains an unfair advantage over his opponent. As to the costs: see *Wigtown Case*, 2 O'M. & H. 230; *Athlone Case*, Ib. 190.

*Hector Cameron*, Q.C., and *Osler*, contra, (after some formal objections which it is not necessary to state and which are not considered in the judgment). In the *Athlone Case*, 2 O'M. & H. 190, the facts were not at all like those here. The *Wigtown Case* is exceptional; half of the case was not gone through, and costs were not asked. As to the rejected votes the point is not open to the respondent on this petition. Under sec. 66 of the Controverted Election Act the respondent might show that the election of the petitioner was undue in the same manner as if he had presented a petition complaining of such election. Under rule 8, referring to proceedings in election matters, the objections do not apply. The fourth objection is the only one that refers to this matter. By the particulars two voters only are mentioned. The petitioner does not claim that voters were not allowed to vote for him so that the election should be set aside. It must be shewn that the omission was material and that it affected the result. The 72nd section of the Act referred to only shews that a person shall not be required to state for whom he voted. The enquiry is collateral as to whether the votes would affect the result. It is not really adding to make up the candidates' majority. As to *agency*, the *Stroud Case* No. 3, referred to in *Saturday Review*, Dec., shews that the rule as to the law of *agency* is less rigid than it was before vote by ballot. The decisions on *agency* referred

to below were before the Ballot Act. There is now no necessity for straining the law on the subject of agency. It has not been shewn there were thirty-five voters bribed who voted. In fact only one of them is proved to have voted. They also referred to the *Boston Case*, 2 O'M. & H. 161; *Lichfield Case*, 1 O'M. & H. 22; *Bewdley Case*, Ib. 16, 18; *Westminster Case*, Ib. 89; *Bodmin Case*, 2 O'M. & H. 117, 120-1; *Staleybridge Case*, 1 O'M. & H. 66, 70; *Shrewsbury Case*, 2 O'M. & H. 36; 2nd *Windsor Case*, Ib. 88; *Bolton Case*, Ib. 138, 141; 2nd *Taunton Case*, Ib. 66; 1st *Taunton Case*, 1 O'M. & H. 185.

*The Attorney-General* in reply.—As to the rejected voters the petitioner states the facts in his petition. They are before the Court, and the particulars given at the trial might, if required, be amended. If this objection had been taken at the trial the amendment might have then been made. The question arises on the admitted facts of the case. The free dinners were intended for Mr. Cameron's voters, and the fair inference is, that those who dined had voted for him. There is no reason why the electors should not pay for their own dinners. The ballot is not intended merely for the protection of the voter. The whole public are interested in having a free election, and the proper polling of the votes. As to Peters's agency, all the circumstances are sufficient to establish his agency. He was the most active and zealous man in his neighbourhood for Mr. Cameron. If the acts of such men are not to bind the candidate, a man may be elected in consequence of the corrupt acts of such men, and yet the candidate is not to be affected by these illegal acts merely because he says the person so acting is not his agent. Peters presided as chairman at a meeting and made speeches in favour of Mr. Cameron: *Warrington Case*, 1 O'M. & H. 42, 46.

September 17, 1875, RICHARDS, C. J. The facts and authorities bearing on the different points are so fully referred to in the judgment of the learned Judge, before whom the matter of the petition was tried, that we are relieved from again referring to them at much length.

The respondent in the election petition does not now dispute the correctness of the decision of the learned Judge, so far as the inspection of the ballots is concerned, and on that inquiry Mr. Cameron's majority was three.

Then as to the eighteen voters who had a right to vote, and whose votes were rejected by the returning officer, of these *eight* tendered their votes for the petitioner. Four others made affidavits of their right to vote, and that they wished to vote for the petitioner, and they gave the affidavits to the deputy returning officer *at the* poll. The other six tendered their votes, but did not say for whom they offered them. The respondent alleged there were two other voters entitled to vote and tendered their votes, which were rejected, and that they would have voted for him. As to the six voters who tendered their votes, but did not say for whom, it was contended there was evidence given at the trial that they declared at the poll that they then intended to vote for the petitioner, though they did not say so to the returning officer.

The eight votes tendered for petitioner and the four who delivered affidavits to the deputy returning officer at the poll, swearing they intended to vote for petitioner, would make twelve for him. Admit it is not clearly established that the other six would vote for him, and suppose they would have voted for respondent and the other two would also vote for him, the petitioner's majority in this view would not be diminished, but rather increased.

It is stoutly contended that because these 18 voters had a right to vote, and were deprived of their franchise; there must be a new election, because if they had voted for the respondent he would have had the majority, and that as the principle of the ballot is, that voting must be secret, therefore these eighteen supporters of Mr. Cameron cannot be permitted to say that they intended to vote for him, and that they do not desire a new election that they may have the franchise restored to them of which they were deprived by the fraud or error of the officer.

It may be true that the public are to a certain extent

interested in having votes given secretly, and that the policy of the law is against its being known for whom a voter casts his vote. But it is also the policy of the law that a community should not be unnecessarily excited by repeated elections when no great public interests are to be served thereby. And to throw a constituency into the excitement and loss of time incident to an election contest to enable eighteen men to exercise their franchise, who all in effect declare to you that the member for whom they intended to vote has been elected, merely adding their votes to increase his majority would be of no practical use to them, but would be positive injury to the country.

Suppose Mr. Cameron had been returned by the returning officer with a majority of ten, and some of respondent's voters had heard that these eighteen of his avowed supporters, who, entitled to vote, had not been permitted to vote for Mr. Cameron, were to file a petition to unseat him, and in the petition had named these eighteen electors that had been deprived of their franchise, and claimed that there ought to be a new election to enable them to vote. What a monstrous absurdity it would be, if every one of these voters came forward and swore that they at the time of the election and ever since had desired the return of Mr. Cameron, and had intended to vote for him, yet, nevertheless, the election must be set aside to enable them to exercise their franchise of which they had been improperly deprived.

The franchise to these men under such circumstances would be no right or privilege to be by them freely exercised as they might think right, but a burden and an injury which they were compelled to bear and sustain for the advantage and convenience of their political opponents.

When we are called upon to set aside an election on the ground that certain freeholders have not been allowed to vote, and have been illegally deprived of their franchise, we ought to be satisfied before granting the request that we are not allowing a mere pretence to redress an injury to prevail, and thereby inflict an injury on the very men



whose rights we are called upon to vindicate. We are satisfied, that the ordering of a new election, instead of declaring Mr. Cameron duly elected, would not truly restore to these electors their right to the exercise of the franchise, but would in fact be diametrically opposite to what they desired, and unless some authority binding us to take such a course can be found, I think we ought not to grant a new election. I shall decline inflicting the further injury on these eighteen freeholders, who have been deprived of their franchise of declaring that the man of their choice is not elected because the votes they intended for him were not recorded for him. Nor do I desire to exhibit this absurd proposition to them, that if they had really desired to elect him, instead of going to the polls and endeavouring to cast their vote for him, they should have remained at home and not endeavoured to vote at all.

The learned Judge has referred to the fact that it will be allowing an ignorant or corrupt officer to deprive many freeholders of their franchise, unless Courts and Judges can exercise reasonable corrective powers to put matters right when the facts are brought before them in a manner that leaves no question as to what are the facts.

At all events, on this point, all the learned Judge decides is, that if Mr. Cameron had a majority of the legal votes according to the ballot papers, no sufficient case is made out to order a new election, *ex debito justitiæ* to enable these men to vote. On the contrary, it manifestly appears it would do additional injustice to them to do so. I think on this point the decision of the learned Judge is correct.

The next question is as to Peters's agency, and the authorizing him to furnish the dinner to the forty voters at Ashley's.

The learned Judge has referred to the decided cases as to agency, and to the evidence of Peters and the petitioner as to the furnishing the dinners. If what passed between them was merely colourable—that petitioner was really desirous of having Peters furnish the dinners with a corrupt desire that it should benefit him in the contest, then the consequences contended for ought to follow, and the

petitioner be made answerable for the violation of the law. But if he was sincere that he did not desire the act to be done, because he feared it might create trouble and difficulty, and he was honest in what he said, then the learned Judge properly decided in his favour on this point.

The learned Judge has a strong opinion that the petitioner was acting *bonâ fide*, and did not desire these dinners to be furnished for fear of difficulty. It does not appear that the petitioner was aware at the time that the dinners had been furnished by Peters or at his instance.

We think on the question of agency and *bona fides* we would not be warranted in interfering with the finding of the learned Judge.

As to the dinners which were paid for by Peters, supposing that Peters is not considered as the agent of the petitioner, how is that to influence the result?

Under the 87th section of the Election Act of 1874, if Peters was not the petitioner's agent he might, nevertheless, under section 90, be prosecuted for misdemeanor, and as to spirituous liquor given on the day of election, he might be subject to a fine.

Under section 94, every candidate who corruptly at any time before or during any election gives or provides, or pays any expenses incurred for meat, drink, refreshment, or provisions for any person in order to be elected, or for the purpose of corruptly influencing any person to give or refrain from giving his vote at such election, shall be deemed guilty of the offence of treating, and shall forfeit \$200, in addition to any other penalty to which he may be liable under the Act. "And on the trial of an election petition there shall be struck off from the number of votes given for such candidate one vote for every person *who shall have voted and is proved on such trial to have corruptly accepted or taken any such meat, drink, refreshment, or provision.*"

And the giving or causing to be given to any voter on the nomination day or the day of polling, on account of such voter having voted or being about to vote, any meat,

drink, or refreshment, or any money, or ticket to enable such voter to procure refreshment, shall be deemed an unlawful act, and the person so offending shall forfeit \$10 for such offence.

By section 98, bribery, treating, undue influence, or any of such offences as defined by that or any other Act of the Parliament of Canada; personation, or any *wilful* offence against any one of the six next preceeding sections of the Act (section 94 being one of the six preceding sections), shall be corrupt practices within the meaning of the Act.

No doubt if the furnishing of these dinners was held to be a corrupt practice, and it was also held that Peters was petitioner's agent, then his election would be affected by Peters's act, though petitioner neither authorized nor approved of it.

But when it is decided that Peters is not his agent, and we are asked to strike off forty votes under section 94, from the number given for petitioner, we must see that the facts before us are sufficient under the statute to justify us in doing so. That section contemplates that the furnishing of refreshment should be done corruptly and for the purpose of corruptly influencing the person receiving it to vote or refrain from voting, and that there shall be a striking off of one vote for every person who shall have voted and is proved to have *corruptly accepted* such refreshment.

We are asked to *presume* that forty persons who received such refreshments voted, and that they corruptly accepted such refreshment.

As I understand the facts there was no public house at the place where the polling was held for that division of the township of Carden, where these dinners were said to have been given. One Ashley had at a previous election prepared dinners for the electors, and had only received a very small sum as compensation for it, and he was disinclined to run the risk of furnishing refreshments again without being assured that he would get his pay.

Many of the electors were obliged to travel some distance in order to reach the polling place, and if no previous arrangement had been made as to procuring some refresh-

ments in that inclement season of the year, it might have caused suffering amongst some of the electors.

It, therefore, did not seem unreasonable that some arrangement should be made before the polling, by which refreshments should be there for those who might wish to buy and pay for them. Peters appears to have made the arrangement for forty dinners at an expense of \$10, and he no doubt intended these dinners for Mr. Cameron's friends. If he had merely arranged for the dinners, and told Ashley he would guarantee him against any deficiency if he would provide forty dinners, and then had paid for those that the parties using refreshments did not themselves pay for, or for such as were not used, there could not be much ground for supposing they were corruptly furnished to induce parties to vote. Then would the bare fact of Peters paying for them, and directing that Mr. Cameron's voters should receive them, shew that they were furnished for the purpose of corruptly influencing those persons to give or refrain from giving their votes at the election?

As far as I understand the evidence, it is not shewn that any of the persons voting had any knowledge that dinners were to be given them, or that they were in any way influenced by their receiving such dinners, or that they *corruptly* received the same. Nor is it shewn that more than one individual who actually voted at the election received a dinner.

Peters in his evidence states that he had recently moved to and entered into business in that part of the country, and speaks of his desire to become favourably known, and that he thought it would be a good way to introduce himself to the people there by taking the course he did; and if that was his real object in supplying refreshments it would not be corrupt under the statute. I do not understand the learned Judge is quite satisfied that this was his only motive. He might have desired to confine his generosity to Mr. Cameron's supporters, and if he had been the agent of the latter the learned Judge might have concluded



that it was a corrupt act which would render Mr. Cameron's election void.

But when we are asked to strike off votes because refreshments were corruptly given, we ought to have reasonably certain evidence that those persons to whom refreshments were said to have been corruptly furnished really did vote, and that such persons corruptly accepted and took such refreshment.

There could have been little or no difficulty in shewing who were the persons that voted at that polling place, and who were the persons that took dinner at Ashley's house on that day, and an examination of these persons might have shewn the circumstances under which they took their dinners, and whether they were corruptly given or taken.

But this evidence is not before us, and when in a matter like this, where the providing refreshments for parties at an inclement season of the year seems like an act of humanity, being at a place where there was no public house, and where it is probable no refreshments would have been prepared but for this arrangement which was made, I think we ought not to presume that persons voted unless it is shewn they did, or that they were corrupted, unless there is evidence to shew they were, particularly as more satisfactory evidence could have been supplied if such were the case than was adduced on this point.

It is probable that the respondent relied on establishing Peters's agency, and therefore did not produce the evidence necessary to make out a case for striking off votes under section 94. The point was first raised at the conclusion of the argument on behalf of respondent, and after the evidence had all been given.

In a matter of so doubtful a character as this, I do not think, under the evidence before us, we ought to assume that forty persons who took dinner at Ashley's on that day dined, and that they *corruptly* accepted such meat and drink, or that it was given to them for the purpose of corruptly influencing them to give their votes at the election.

It is too grave a matter to throw a large constituency into the turmoil and excitement of an election contest, unless some great public interests are to be secured thereby. This particular constituency has already passed through the ordeal of having one of the elections for the present Dominion Parliament set aside in the contest between the same parties, and we are now asked to order another election.

I think we would not be justified in doing so unless a clear case was made out which required it. I do not think that such a case is here made out.

Nor do I think that the respondent should be declared to have been duly elected because of the supposed corrupting of the voters by the dinners eaten at Ashley's. I doubt if any person would corruptly give a dinner costing twenty-five cents to men who travelled fifteen or twenty miles on a winter's day to give their votes for the man of their choice. I doubt if the giving of a dinner under such circumstances could have been given for the purpose of corruptly influencing them to vote, and I have much greater doubts if such electors would have *corruptly* accepted such refreshment.

And as there is no satisfactory evidence of how many of the persons who dined at Ashley's voted, or that any of them corruptly accepted such dinner, I fail to see how we can interfere on this ground for the respondent.

As to the preliminary objections taken by Mr. Cameron, we have not referred to them, and it is not at all probable we would have felt called upon to give effect to them, inasmuch as there were no special rules of Court applicable to these cases, and the language of the statute is to a certain extent ambiguous, and the appellant in good faith intended to comply with its provisions.

The effect of the judgment is to confirm the judgment of the Judge, and to direct the Clerk to certify to the Speaker of the House of Commons the judgment and decision of the Court on the several questions and matters of fact as well as of law. The appellant to pay the costs of appeal. The

moneys deposited to be returned to the petitioner and respondent, if he desire it.

*Appeal dismissed.*

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REGINA V. MABEY.

*Compromising offence under 39 Vic., ch. 32—Conviction for.*

A conviction under 37 Vic., ch 32, sec. 39, O., that one M. the defendant, did unlawfully attempt and offer to compound, and offer to compromise, compound and settle with one R. a certain offence which the said R. had charged the said M. for selling spirituous and intoxicating liquors without a license, with a view of stopping *or* having the said charge dismissed for want of prosecution: *Held*, bad, and quashed; 1. For not shewing that M. was a person who had violated any of the provisions of the Act; 2. for stating the charge in the alternative, with a view of stopping *or* having; and 3. for adjudging the defendant to pay a sum for costs, without saying to whom.

June 8, 1875, *Osler* obtained from MORRISON, J., sitting alone, a rule *nisi* calling on Peter B. Nelles, Charles E. Woolverton, Jonathan Woolverton, and William Forbes, Justices of the Peace, to shew cause why a conviction made by the said Nelles and Woolvertons, dated 19th of May, 1875, against the defendant, for that he did, on the 26th of January, 1875, "unlawfully attempt and offer to compound, and offer to compromise, compound, and settle with one James Rugs, a certain offence with which the said James Rugs had charged the said Mabey, for selling spirituous and intoxicating liquors without a license, with a view of stopping or having the said charge dismissed for want of prosecution," should not be quashed with costs on the grounds:

1. That the information charged no offence, and the conviction did not show that said Mabey had violated any of the provisions of the act to amend and consolidate the law for the sale of fermented and spirituous liquors.

2. The conviction did not properly describe the offence or set it forth with sufficient certainty, and did not set out or shew the manner in which the offence was committed, or in what way the offer was made.

3. The conviction erroneously awarded payment of costs and imprisonment in default of payment; and the conviction did not award to whom the costs were to be paid.

4. There was no evidence to support the conviction.

5. The justices erroneously rejected and refused to receive the evidence of Mabey and his wife.

The charge in the information (which was laid by William Forbes), was, that Mabey and his wife, did, &c., the 26th day of January, 1875, "attempt and offer to compromise, compound, and settle a certain offence charged against the said George Mabey for selling spirituous liquors without license, with a view of stopping or having the same dismissed for want of prosecution," &c.

At the trial taken before the magistrates, it appeared from the evidence of one *James Rugs*, that he had laid an information before William Forbes, a justice of the peace, against Mabey for selling liquor without a license, and that Mabey called on him and asked him to drop the matter; and after some conversation, Mabey asked Rugs how much he had spent in the matter, and on Rugs saying he had spent \$5, Mabey called his wife and she paid Rugs the money which Rugs took away, but subsequently on the same day, offered back to Mabey, and he took it back. Rugs also gave evidence that Mrs. Mabey offered him \$10 to keep the witnesses out of the way, but he refused it.

For the defence, the evidence of Mr. and Mrs. Mabey was tendered and rejected. *Samuel Mabey* said he was present while Mrs. Mabey and Rugs were talking, and nothing was said about offering \$10. He saw no money.

The justices thereupon convicted the defendant George Mabey, and discharged Mrs. Mabey. The conviction charged Mabey with the offence as set out in the information, and directed that he should be imprisoned for three months with hard labour and should pay \$5.35 costs, and if the sum were not paid forthwith, they ordered that the said sum be levied by distress and sale, and in default of sufficient distress, imprisonment for ten days after the



expiration of the three months, unless the costs were sooner paid.

September 7, 1875. *J. K. Kerr*, shewed cause, and cited *Re Lucas*, 29 U. C. R. 81; *Regina v. Boardman*, 30 U. C. R. 553; 32-33 Vic. ch. 31, secs. 68, 73.

*Osler*, supported the rule. The conviction is double and therefore bad: *Paley* on Convictions, 5th ed., 196, 210, 212. It is also bad because it awards hard labor. A conviction bad in part is bad altogether: *Paley*, 5th ed., 256. It is also bad because they refused to admit the defendant as a witness: 36 Vic. ch. 10, sec 4; *Paley*, 5th ed., 136; 32-33 Vic. ch. 31, sec. 39, 41.

September 17th 1875, MORRISON, J.—I am of opinion that the rule must be made absolute to quash the conviction.

The 39th section of 37 Vic. ch. 32, O., enacts that, "Any person who, having violated any of the provisions of this act, shall compromise, compound, or settle, or shall offer or attempt to compromise, compound, or settle the offence with any person or persons, with the view of preventing any complaint being made in respect thereof, or if a complaint shall have been made with the view of getting rid of such complaint, or of stopping or having the same dismissed for want of prosecution, or otherwise, shall be guilty of an offence under this Act, and on conviction thereof shall be imprisoned at hard labor in the common gaol of the county in which the offence was committed for the period of three calendar months."

Now, in order to give the Justices jurisdiction, it should appear, and the conviction should shew that the person charged and convicted was a person who had violated some provision of the statute. No such averment or fact appears; all that is stated is, that the defendant did, on, &c., "unlawfully attempt and offer to compromise, compound, and settle with one James Rugs, a certain offence, which

Rugs had, before one William Forbes, a Justice of the Peace, charged the defendant for selling spirituous and intoxicating liquors without having a license therefor, with a view of stopping *or* having the charge dismissed for want of prosecution, contrary to the statute," &c., and that "we (the Justices,) adjudge the said defendant for his said offence to be imprisoned, &c., for the space of three calendar months with hard labour; and also adjudge the said defendant to pay \$5.35, for costs in this behalf," (without stating to whom the costs shall be paid); "and if the said sum be not paid forthwith, that the same be levied by distress, &c., and in default of sufficient distress, that the defendant be imprisoned, &c., for the space of ten days," &c.

At the utmost, all that appears is, that the defendant was convicted of having attempted and offered to compromise, &c., a certain offence which was charged against the defendant, (not that a complaint had been made as required in the section,) for selling spirituous and intoxicating liquors without a license. It is not stated that it was an offence within one of the provisions of the 37 Vic. ch. 32, O., or that the certain offence was committed after the passing of that Act, or that he had violated any provision of that Act.

Upon this ground alone, I think the conviction ought to be quashed. It is laid down in several cases that where circumstances are necessary to constitute the offence, and where no offence can be committed independent of such circumstances, they must be established and appear and be set out.

In this case, one such circumstance, and a chief one is, that the party charged had violated some provision of the Act in question; without that fact being established, the defendant could not be convicted; upon it is based the offences created by the 39th section of the statute.

The conviction is, I think, open to other objections. The charge is laid in the alternative, viz: that the attempt to compromise, &c., was made with a view of stopping *or* having the complaint dismissed for want of prosecution, two distinct offences by the 39th section; and the defen-

dant is convicted, not of one of the offences, but of one or the other of them. I think it is essential to the validity of a conviction that the party charged should be convicted of a single, distinct, positive, and definite charge. I refer to *Paley*, 5th ed., 199; *Davy v. Baker*, 4 Burr. 2471; *Rex v Morley*, 1 Y. & J. 221; *Ex parte Pain*, 5 B. & C. 251; *Regina v. Hoggard*, 30 U. C. R. 152.

Then as to the order in the conviction adjudging costs and imprisonment for ten days if not paid, I think it is bad, assuming that the justices had authority to so adjudge under the 45th section of the Act. They should, in that case, under the 53rd section of the Act respecting Justices out of sessions, in relation to summary convictions and orders, have ordered and awarded the defendant to pay to the complainant such costs. Here, the conviction is silent as to whom the costs are to be paid.

It is unnecessary to refer to the other objections taken.

The rule will be absolute to quash the conviction.

*Rule absolute.*

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## PEPPER V. BUTLER.

*Lease—Proviso for sale and putting an end to the term—Construction.*

Declaration, that J. M., being seized in fee of certain land, let it by deed to defendant for 10 years, and the defendant thereby promised to pay him the yearly rent specified; and afterwards, during said term, J. M., by deed granted to the plaintiff all his reversion in the said land; and one year's rent became due, and remains unpaid.

Plea, that it was provided by said deed, that if J. M., should at any time have an opportunity to sell the said lot, then the said deed should be cancelled, and defendant should give up the place; that before any rent became due J. M. had an opportunity of selling and did sell said lot to the plaintiff, and by deed granted all his reversion therein to the plaintiff, as alleged; and said J. M., with plaintiff's concurrence, before said rent became due, gave notice to defendant that he had sold the said lot to the plaintiff, and that he then put an end to the lease, and said term was then put an end to before the rent accrued due.

*Held*, plea bad, per Richards, C. J., because the notice could not be given by J. M., after he had assigned his reversion, and it did not appear that the lease had been cancelled, or the term put an end to, or that defendant had given up the place. Per Wilson, J., because the sale alleged was not within the provision, being a sale of the reversion subject to the lease, not of the land with the immediate right of entry.

APPEAL from the County Court of the County of Brant.

The appeal was from the decision in favor of the plaintiff on the following pleadings and demurrer:—

Declaration: that Jacob Moore, being seized in fee of the west half of lot two, in the eleventh concession of the township of Burford, in the county of Brant, let the same by deed to the defendant, to hold for the term of ten years from the 15th day of October, 1873; and the defendant, by the said deed, promised and agreed with the said J. M. to pay to him the yearly rent of \$250 on the 15th day of October in each year during said term; and afterwards during said term the said J. M., by deed, granted to the plaintiff all his reversion of and in the said west half of said lot; and afterwards, during the said term, one year of the said rent became due, and the same now remains due and unpaid.

Second count: that J. M., being seized in fee of certain land and premises situate in the township of Burford, in the county of Brant, demised the same to the defendant to hold for the term of ten years from the 15th day



of October, 1873, at the yearly rent of \$250; and the said defendant entered upon the said lands and premises under the said demise; and afterwards, and during the said demise, the said J. M., by deed, granted to the plaintiff the reversion of and in the said lands and premises; and afterwards, during the said demise, one year of the said rent became due, and the same now remains due and unpaid.

Pleas—1. To first count: that it was and is provided in and by the said deed that if the said J. M. should at any time have an opportunity to sell the said lot, then the said deed should be cancelled, and the defendant should give up the place. And the defendant says that after the making of the said deed, and before any rent became due thereunder, the said J. M. had an opportunity of selling the said lot, and did sell the same to the plaintiff, and by deed granted all his reversion therein to the plaintiff, as in the said first count alleged; and the said J. M., with the concurrence of the plaintiff, before the said rent became due, to wit, on the 14th day of July, 1874, gave notice, in writing, to the defendant that he had sold the said lot to the plaintiff, and that he then determined and put an end to the demise contained in the said deed in pursuance of the provision of the said lease. And the defendant says that the said term then became and was put an end to before the said rent accrued due.

4. To the second count: that the said demise was deed, made by the said J. M. to the defendant by and was subject to the provision therein contained, that if the said J. M. should at any time have an opportunity to sell the said lands, then the said deed, should be cancelled, and the defendant should give up the place and that after the making of the said deed, and before any rent became due thereunder, the said J. M. had an opportunity of selling the said lot and did sell the same to the said plaintiff, and by deed granted all his reversion therein to the plaintiff, as in the said first count alleged; and the said J. M., with the concurrence of the plaintiff, before the said rent became due, to wit, on the

14th day of July, 1874, gave notice in writing to the defendant that he had sold the said lot to the plaintiff, and that he then determined and put an end to the demise contained in the said deed in pursuance of the provision of the said lease ; and the said term then became and was put an end to before the said rent accrued due.

Demurrer to the said pleas, on the grounds :—1. That while the said pleas confess the plaintiff's right to recover the rent mentioned in the counts to which the said pleas are pleaded, unless avoided by the cancellation of the deed referred to in the said pleas, and by the defendant giving up possession of the lot demised by the said deed, yet the said pleas do not, nor does either of them, shew that the said deed was cancelled, and that the defendant gave up the possession of the said lot before the said rent accrued due.

2. That the giving of the said notice referred to in the said pleas did not cancel the said deed and put an end to the term thereby created.

Joinder.

The demurrer was argued in January term last, and judgment given by Jones, County Judge, for the plaintiff, as before mentioned.

From that judgment the defendant appealed, on the grounds :—1. The defendant's pleas shew the term was put an end to before any rent accrued due, and the term having been created by deed, no rent accrued thereunder.

2. The judgment on the said demurrer should have been for the defendant.

May 26, 1875. *T. B. McMahon*, for the respondent, was called on by the Court to support the judgment in the Court below. He cited and relied on *Lord Ward v. Lumley*, 5 H. & N. 87 ; *Cadby v. Martinez*, 11 A. & E. 720.

*M. C. Cameron*, Q. C., for the appeal. The plaintiff can only succeed by reason of the reversion continuing. Anything before his purchase would not enure to him unless that continued. The plea alleges the reversion was put an end

to with his concurrence. He referred to *Furnivall v. Grove*, 8 C. B. N. S. 496; *Woodfull, L. & T.*, 10th ed., 271, and cases there cited, and to *Carman v. Hartley*, 9 C. B. 634.

October 1, 1875, RICHARDS, C. J.—The first count alleges that Jacob Moore being seized in fee of the west half of lot No. 2, in the 11th concession of Burford, let the same by deed to the defendant, to hold for ten years from the 15th of October, 1873; that the defendant, by said deed, promised Moore to pay him the yearly rent of \$250 on the 15th of October in each year during the said term, and afterwards during the said term Moore by deed granted to the plaintiff all his reversion in the said lot, and afterwards during the said term one year of the said rent became due, and now remains due and unpaid.

The plea to that count is, that it was provided by the said deed that if Moore should at any time have an opportunity to sell the said lot, then the said deed should be cancelled, and the defendant should give up the place; and that after making the deed and before any rent became due under it, Moore had an opportunity of selling the said lot, and did sell it to the plaintiff, and by deed granted all his reversion therein to the plaintiff as in the first count alleged; and Moore, with the concurrence of the plaintiff, before the rent became due, to wit, on the 14th of July, 1874, gave notice in writing to the defendant that he had sold the said lot to the plaintiff, and that he then determined and put an end to the demise in the said land in pursuance of the provisions of the said lease. And that the said term then became and was put an end to before the said rent accrued due.

What was the effect of the lease as set out in the plea and declaration? The defendant became seized of the estate for the term of ten years, subject to the payment of the yearly rent, and liable to be put an end to at the option of the lessor, if he should have an opportunity to sell the lot. A proviso, that if the lessor at any time

shall have an opportunity to sell the lot, that the deed shall be *cancelled*, and the lessee shall give up the place, seems equivalent to saying that the term shall thereupon cease and be at an end.

By literally following the words, the real intent of the parties can hardly be given to the instrument. The merely having an opportunity to sell the place could not of itself avoid the lease—something more must have been intended to be done. The lessor must have availed himself of the opportunity, and the reasonable interpretation is, that he must have signified his intent to put an end to the demise by giving a notice to the lessee—the whole followed by a sale of the place.

The object of the proviso seems to have been that, as a long lease might have prevented the sale of the place by the lessor, he could, if he thought it was necessary to do so, to enable him to sell his place to better advantage, terminate the lease by giving notice.

It does not appear to me that the object was to make the term end on the lessor having the opportunity to sell, so as to enable the tenant to put an end to it on his hearing that the lessor had an opportunity to sell, or on his furnishing a purchaser; but that it was the right of the lessor, which he might exercise or not.

It may be compared to the provision in some leases that the tenant may terminate the lease on giving six months' notice before the expiration of seven or fourteen years, and then, unless the tenant exercises the option, and gives the notice according to the provisions of the lease, the term continues.

If this be the proper view to take of the effect of the lease, then Moore should have given notice of his intention to terminate the lease before he assigned his reversion. As the matter appears on the record, I understand that Moore assigned his reversion, and after so assigning, and with the assent of the plaintiff, he gave the notice referred to. At that time he had ceased to have any interest in the premises which he had sold and conveyed, and was a mere



stranger, as regards the estate. The right to terminate the lease was personal to Moore, and if he sold the place without exercising the right, the purchaser, under the terms mentioned, does not appear to have had the right to terminate after the reversion was transferred to him, any more than Moore would have had if he had never conveyed his right to the plaintiff, and had never had an opportunity of selling the lot.

In this view, therefore, it seems to me that the plea is bad, and that the plaintiff may recover, because the lease exists, and the term has not been put an end to.

If, however, the matter set up by the plea is not in the nature of a defeasance, but only an agreement to cancel and to put an end to the term, the lease has not been in fact cancelled; and if it had been, it does not follow, according to the case of *Lord Ward v. Lumley*, 5 H. & N 87, that merely cancelling the lease would put an end to the term.

If the right existed on the part of the defendant to put an end to the term by cancelling the lease, there was the further provision that the defendant should give up the place. Now, it is not alleged in the plea that he had given up the place. If he had given up the place, and the lessor or the plaintiff had accepted possession thereof after the notice given to the defendant, perhaps it might be held that that worked a surrender of the term, particularly if the plaintiff had after that let the place to another tenant, who had gone into possession with the defendant's assent.

The case of *Cadby v. Martinez*, 11 A. & E. 720, shews when a notice is necessary to put an end to the term it must be given strictly in accordance with the proviso in the lease; and although intended to be given for the purpose of putting an end to the term, and the lessor according to the finding of the jury knew it was given with that intent, yet the Court held that the term was not put an end to, as the notice was not given in accordance with the proviso.

The fourth plea is open to the same defects as the first, and in the view we take both are bad.

The appeal, therefore, is dismissed with costs.

WILSON, J.—The plaintiff, as assignee of the reversion of one Jacob Moore, sues the defendant upon a demise by deed from Moore to the defendant of certain land for the term of ten years, from the 15th of October, 1873, at the yearly rent of \$250, payable yearly, in order to recover from the defendant the first year's rent, which the plaintiff alleges fell due after the assignment was made to him of the reversion.

The defendant pleads that it was provided by the deed "that if Moore should at any time have an opportunity to sell the said lot, then the deed should be cancelled, and the defendant should give up the place;" and he alleges such an opportunity to sell did arise, and Moore "did sell the same to the plaintiff, and by deed granted all his reversion therein to the plaintiff," as alleged.

I am of opinion that the words, "If the said Jacob Moore should at any time have an opportunity to sell the lot," are words too vague and indefinite to maintain, as a condition, that the deed should be cancelled, and the defendant should give up the place; or, in other words, they are too vague and indefinite to defeat and determine the estate which had been created.

What was having an opportunity to sell? It is not if the lessor should desire to sell or be desirous of selling he should give notice to the tenant of such desire, and so determine the lease; nor is it if the lessor had an opportunity to sell, and gave notice thereof to the tenant, the lease should be determined; for in either of these cases the notice would render certain and definite the time and the fact of such determination.

But here the landlord might have had an opportunity to sell, yet might not have desired to sell; and is the lease to be avoided by the mere opportunity he has to sell, against his will, or without the wish to sell?

Attempting, or going about, or entering into communication to sell, "are words uncertain and void in law \* \* \*

and the law rejects conations, goings about, as things uncertain which cannot be put in issue": *Mildmay's case*, 6 Rep. 40a, 42b; *Foy v. Hynde*, Cro. Jac. 697.

It is said in *Mildmay's case*, 6 Rep. 42b, "*non efficit conatus nisi sequitur effectus*," and the defendant may therefore say he has shewn more than the opportunity to sell—he has shewn the actual sale; and the declaration shews that as well, for the plaintiff sues as a purchaser from the lessor, and therefore he is entitled to succeed.

But there is another difficulty to be got over before the defendant can rely upon the sale as following from the opportunity to sell combining to defeat the term which was granted. He must shew the lessor did sell the land, that is, the whole estate and interest in the land, with the right to the immediate possession of the property, as if no lease had ever been made of it.

He must shew, in fact, that the lessor on his sale treated the lease as at an end, or as no bar to the immediate entry of the purchaser into the actual occupancy of the land, because it was that which was provided for, and nothing else.

There is no provision against the landlord assigning his reversion, nor for determining the lease if he did so. The object was that the lessor should not be embarrassed, if he could sell the land, by reason of the defendant's tenancy, in case the purchaser objected to buy the land with the existing tenancy against him, but desired the immediate possession of it himself.

There was no purpose to serve the tenant in such a case, it was to protect or benefit the landlord.

It so happened the lessor did not "sell the said lot," but, as the defendant says, he "by deed granted all his reversion therein to the plaintiff, as in the first count alleged."

Now a sale of the *reversion* is a sale not of the land with the right to the purchaser of immediate possession, but is a sale of the land subject to the lease, and so expressly providing for its continuance.

If this proviso be a condition, and entitled an entry to

be made after the sale, no one but the lessor could enter upon the tenant.

The lessor should, perhaps, upon an opportunity to sell, have given notice of it to the tenant, and determined the lease, while he who made the condition had still the reversion in himself, and the right of entry.

But it is not necessary to consider that view of the case. It is enough that the lessor did not sell the land with the immediate right of entry and possession to the plaintiff, but the reversion only, preserving and maintaining the lease, and such a sale is in no sense within the purport of the condition or proviso.

The cancelling of the lease, if it had been done, could in no case have destroyed the estate which had once passed by the lease. It is an expression supplementary to the due construction of the condition. But it is not necessary to resort to it in this case.

Both plaintiff and defendant agree that the plaintiff is merely the assignee of the reversion, and not the absolute owner of the land, and that he is not entitled to the immediate possession of the land; and the reason is that the facts shew the defendant is entitled to such possession by virtue of his lease which has not been determined by the plaintiff's purchase, nor by any matter stated in the plea.

If the defendant had given up possession to enable the lessor to give the occupancy at once to the plaintiff, and the plaintiff had bought upon such an agreement, that would have been a surrender by operation of law. Nothing of the kind took place here.

For these reasons I am of opinion the appeal must be dismissed with costs.

MORRISON, J., took no part in the judgment, being engaged at an Assize.

*Appeal dismissed with costs.*

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## LEE ET AL. V. LORSCH.

*Lease—Act respecting Short Forms—Covenant not to assign—How far binding on assigns—Proviso for re-entry.*

A lease dated 1st July, 1868, purported to be made "in pursuance of an Act to facilitate the leasing of lands and tenements." The proper title of the statute then in force, C. S. U. C. ch. 92, being "an Act respecting short forms of leases;" and it contained the following covenant, "and the said lessee, *for himself, his heirs, executors, administrators and assigns, hereby* covenants with the said lessor, *his heirs and assigns*, to pay rent and to pay taxes, and will not assign or sub-let without leave." Then followed "Proviso for re-entering by the said lessor on non-performance of covenants, or seizure, or forfeiture of the term for any of the causes aforesaid." The plaintiffs, as assignees of the lessor, brought ejectment claiming to re-enter for breach of the covenant not to assign, by reason of an assignment of the lease made by the administratrix of the lessee.

*Held*, 1. That the reference to the statute was sufficient, notwithstanding the misdescription of its title.

2. That the covenant could not take effect under the statute, the short form given there omitting the words above italicised.

3. That the proviso for re entry applied only to the non-performance of positive, not negative covenants; and that there was, therefore, no right of re-entry here.

4. That there was no material difference between "re-entering," the word used in the lease, and "re-entry," the word used in the statute.

RICHARDS, C. J., thought the weight of authority in favour of holding that the administratrix was not bound by the covenant not to assign, not being named in it, and that the proviso for re-entry applied only to positive covenants; but that in a Court of Appeal it might properly be held otherwise on both points.

WILSON, J., inclined to think the covenant one concerning the land, which would bind the assigns, though not named in it; but held that the proviso for re-entry did not apply to it.

EJECTMENT to recover the east half of Lot 1 on Queen street, in Teraulay Town, in Toronto, containing by admeasurement one quarter of an acre.

The defendant defended for the whole of the land.

The plaintiffs claimed title to the land by deed, dated 11th January, 1873, from John Hillyard Cameron, who leased the premises in question to one John O'Connor, under whom or whose administratrix the defendant entered into and claims possession; and the plaintiffs as purchasers from the said Cameron, and as assignees of the reversion in fee in the said premises, claimed to be entitled to the benefit of all the covenants in the said lease; and under

the clause of re-entry on the said premises for breach of any covenants in the said lease they claimed to enter and take possession for breach of the covenant for assigning the said lease and premises, and sub-letting the same without leave, contrary to the covenants in the said lease for assigning or sub-letting without leave.

The defendant asserted title in Mary Jane Gray, under whom he claimed the right to possession of the said premises.

The cause was heard before Hagarty, C.J.C.P., at the Spring Assizes, at Toronto, for 1874.

The plaintiffs' title was admitted.

The defendant claimed as tenant of Mary Jane Gray, under an assignment, dated the 24th November, 1873, by Ann Gilgin, the administratrix of John O'Connor, to Gray, of a lease of the premises in question, made by the Hon. J. H. Cameron to the said O'Connor, dated the 1st day of July, 1868, for twenty-one years.

The lease made by Mr. Cameron to O'Connor purported to be made "in pursuance of an Act to facilitate the leasing of lands and tenements."

The covenants, so far as material, were: "And the said lessee, for himself, his heirs, executors, administrators, and assigns, hereby covenants with the said lessor, his heirs and assigns, to pay rent and to pay taxes—and will not assign or sub-let without leave." The proviso for re-entry was as follows:—"Proviso for re-entering by the said lessor, on non-performance of covenants, or seizure or forfeiture of the term for any of the causes aforesaid."

For the defence it was objected that the covenant not to assign was not broken so as to give a right of re-entry: that the lease was under the statute: that the covenant not to assign was merely personal to the lessee, and did not extend to his representatives: that the estate came to the defendant by act of law, *i. e.*, on the death of the original lessee, under the letters of administration it vested by law in the administratrix; and that no demand of possession was shewn. No notice was given declaring the lease forfeited.

The learned Chief Justice found for the plaintiff, stating that all these points could be raised hereafter.

In Easter term, May 20, 1874, *Leith*, Q. C., obtained a rule *nisi* to set aside the verdict and enter a nonsuit, or a verdict for the defendant, pursuant to leave reserved, or to the Law Reform Act of 1869, for misdirection of the learned Chief Justice who heard the cause, or as being contrary to law, inasmuch as it was held that the assignment proved at the trial was a breach of the covenant not to assign contained in the lease in question in this cause, and that the plaintiffs, as the assignees of the reversion, were entitled to take advantage of such breach; whereas there has been no non-observance of the covenant, inasmuch as it would not extend to bind assignees in law, or assignees in deed of assignees in law, nor restrain the administratrix of the lessee or her assigns from assigning, even though the lessee had covenanted that he and his assigns would not assign. The lessee, in fact, does not covenant that his assigns will not assign, but only that he will not: therefore there has been no breach of the covenant. The proviso for re-entry does not extend to the alleged non-observance in this case of such covenant, nor does it under any circumstance extend to non-observance of a covenant that the lessee will not assign, or of a covenant that he and his assigns will not assign. Admitting a breach of the covenant, the assigns of the lessor are not within the proviso for re-entry, and cannot re-enter for such breach. The defendants will contend that the lease is to be construed irrespective of the Consol. Stat. of U.C., ch. 92.

June 20, 1874. *J. H. Cameron*, Q. C., shewed cause. The reference to the statute in the lease is sufficient. There is a covenant not to assign, and a condition for re-entry. A covenant by a lessee that he will not assign does not bind the assignee so as to create a forfeiture. If only the word lessee had been used, that would not create a forfeiture when the administratrix assigned. The "Act respecting short forms of leases" is Consol. Stat. U.C., ch.

92, and the covenant No. 7, is to be carried out in the same way as if the words were "that he, the said lessee, his executors, administrators and assigns, shall not, nor will, during the said term, assign, transfer or set over, or otherwise by any act or deed, procure the said premises or any of them to be assigned, transferred, set over, or sub-let, unto any person or persons whomsoever, without the consent in writing of the lessor," &c. A lease may be made partially under the statute, or wholly under it. The words of the covenant are broad enough of themselves to prevent the administratrix from assigning. The damages might be recovered for a breach of the covenant, but that would not create a forfeiture unless there was a condition that the term should cease if the lessee assigned: *Paul et al. v. Nurse*, 8 B. & C. 486; *Doe d. Cheere v. Smith*, 5 Taunt. 695; *Roe d. Gregson v. Harrison*, 2 T. R. 425; *Seers v. Hind*, 1 Vesey, jr., 294; *Spencer's Case*, 5 Rep. 16a; *Baily v. De Crespigny*, L. R. 4 Q. B. 180, 186; *Roe d. Dingly v. Sales*, 1 M. & S. 297; *Williams, v. Earle*, L. R. 3 Q. B. 739; *West v. Dobb*, L. R. 4 Q. B. 634; *Toleman v. Portbury*, L. R. 7 Q. B. 344.

*Leith, Q.C.*, contra. The lease is not within the Act respecting short forms of leases. It purports to be made in pursuance of "An Act to facilitate the leasing of lands and tenements;" whereas the Act in the Consol. Stat. ch. 92, is entitled, "An Act respecting short forms of leases," and the schedule says, "in pursuance of the Act respecting short forms of leases." When the statute prescribes a form, that form ought to be literally followed. In *Jackson v. Kassel*, 26 U. C. R. 341, the mother of an illegitimate child had sworn that the defendant was the father of such child, whilst the statute required she should swear that he was "really" the father. The Court held the affidavit insufficient. In *Harding v. Knowlson et al.*, 17 U.C. R. 564, where the statute required an affidavit that the mortgage was not made for the purpose of preventing the creditors of the mortgagor from obtaining payment of any claim against him, the affidavit used the word creditor in the singular number, and the



Court held the omission fatal. The learned Chief Justice in giving judgment in that case said they would be legislating if they sanctioned the adoption of equivalent words in a statute which was not simply directory. In *Nicol v. Boyne*, 10 Bing. 339, where in the copy of the writ it appeared directed to the *Sheriff* of London, whilst in the original writ it was directed to the *Sheriffs*, defendant was discharged out of custody. *Jackson v. Jackson*, 3 Dowl. 182; and *Baker v. Weedon*, 2 Dowl. 707, are cases shewing similar strictness. See also 1 *Hayes on Conveyancing*, 5th ed., 164. 25 & 26 Vic., ch. 53, sec. 67, refers to the form of deed in England, and provides that they may be modified. Here the clause as to re-entry is not embodied in the deed, the words "for non-payment of rent," are left out. *Doe d. Spencer v. Godwin*, 4 M. & S. 265, decides that "hereinafter contained" does not apply to covenants "thereinbefore contained." See also *Doe d. Abdy v. Stevens*, 3 B. & Ad. 299; *Doe d. Palk v. Marchetti*, 1 B. & Ad. 715; *West v. Dobb*, L. R. 5 Q. B. 460; S. C., L. R. 4 Q. B. 634. The smallest departure from the form cannot be permitted. There is no difficulty in construing the lease without the statute. The proviso does not apply to a negative covenant: *Williams v. Eurlle*, L. R. 3 Q. B. 739; *West v. Dobb*, L. R. 4 Q. B. 637, note. The word assignees is there mentioned; no such expression is introduced here. Even if it were, the condition would not be within the statute of Hy. VIII. as to assignees of reversion: *Duppa v. Mayo*, 1 Wms. Saund. 380, 451; *Woodfall* L. & T., 10th ed., 548, note. As to a condition of re-entry on breach of covenant not to assign by reversioner, see *Spencer's Case*, 1 Sm. L. C. 60, 69; *Bally v. Wells*, 3 Wils. 25. Right of re-entry only extends to the lessor by the contract of the lease. There is no contract his assignee shall enter. The Act does not extend to assignees. The covenant being only personal and collateral, does not run with the land: *Shep. Touch.* 144-5; *Smith's Law of Real and Personal Property*, 4th ed., 694; *Co. Litt.* 215 b., last note of sec. 347. The condition as to assignment, schedule 7 in our statute, is not governed by

section 1, but by section 6. Sections 1, 2, 3, 4 and 5 should be read together. No. 6 begins a fresh agreement, not extending to assignees: *Crusoe d. Blencowe v. Bugby*, 2 W. Bl. 767. Assignees must be named to be bound: *Williams v. Earle*, L. R. 3 Q. B. 739; *Baily v. De Crespigny*, L. R. 4 Q. B. 180, 186; *Duppa v. Mayo*, 1 Wms. Saund. 453; *Doe Cheere et al. v. Smith*, 5 Taunt. 795; *Seers v. Hind*, 1 Vesey Jr. 295; *Doe d. Gregsor v. Harrison*, 2 T. R. 425; *Doe v. Bevan*, M. 3 & S. 353; 9 *Bally v. Wells*, 3 Wils. 33; *Shep. Touch.* 144-5; *Smith's Real and Personal Property*, 4th ed., 694. The assignment is in trust to sell, and its effect is only to make the assets of the estate available; and a person endeavouring to make the assets of an estate available is favoured over those holding *sui juris*. He cited also *Platt on Covenants*, 406 notes; *Church v. Brown*, 15 Vesey 258, 263; *Doe d. Mitchinson v. Carter*, 8 T. R. 57, 61; *Doe d. Spencer v. Goodwin* 4 M. & S. 265; *West v. Dobb*, L. R. 5 Q. B. 460; *Haycock v. Phillips*, 5 H. & N. 183; *Doe d. Holland v. Worsley*, 1 Camp. 20. As to mis-recital of the statute, see *Davis v. Pitchers*, 24 C. P. 516; *Roaf v. Garden*, 23 C. P. 59.

*J. H. Cameron*, Q.C., in reply, referred to 14-15 Vic. ch. 8, Interpretation Act, sec. 6, sub-sec. 8, the original Act as well as the Consol. Stat.: 1 *Platt on Leases*, 400, 401, 428, as to assignees of covenant. The lease is made subject to payment of rents and covenants. The effect is that the assignee takes, subject to all the covenants of the original lease.

October 1, 1875. RICHARDS, C. J.—The first difficulty is to say (assuming that the Consol. Stat. U. C., ch. 92, applies to this lease) how the material covenants contained in it are to be construed. Some of the words in the lease are those that are used in the first column of the form in the schedule; and if the words of column two are to be considered as used, then it will not be so difficult to decide what the covenants are.

The statute says, sec. 1, "When a deed made according to the form of the first schedule, \* \* or any deed expressed to be made in pursuance of this Act, or referring

thereto, contains any of the forms or words contained in column one of the second schedule, \* \* and distinguished by any number therein, the deed shall be taken to have the same effect and be construed as if it contained the form of words contained in column two of the same schedule, and distinguished by the same number as is annexed to the form of words used in the deed; but it shall not be necessary, in any such deed, to insert any such number."

The first covenant in the schedule is, "That the said *lessee* covenants with the said *lessor* to pay rent."

The covenant in the deed is, "and the said *lessee*, for himself, his heirs, executors, administrators, and assigns, hereby covenants with the said *lessor*, his heirs and assigns, to pay rent."

If the words in the first column had been used, the effect of the covenant would be that after the words, "*lessor*, his heirs and assigns," the following would come in, "that he, the said *lessee*, his executors, administrators, and assigns, will, during the said term, pay unto the said *lessor* the rent hereby reserved, in manner hereinbefore mentioned, without any deduction whatsoever." The party who prepared the lease has not thought proper to use the words in column one to indicate the covenant that is to be entered into by the *lessee*, but he inserts the covenant *in extenso* in the words above quoted, and his covenant is to pay the rent.

This covenant, I suppose, under the authority of *Spencer's Case*, 5 Rep. 16 would run with the land, and would bind his executors, administrators, and assigns, for the time being, to pay the rent, without any covenant that they as such would do so. Though that is so, there is no express covenant that he, his executors, administrators, and assigns, will do so.

This being the case, can we assume that the parties, in drawing up this special covenant, intended to extend it to the acts of the executors and assigns of the *lessee*, beyond what the covenant itself, in its own words, would carry it, without the aid of column two.

If the words in the covenanting part of column two were to be wholly introduced, that could have been done by using the words themselves in the lease, or by simply using the words of column one. I do not think that half the covenant can be put in *in extenso*, and the other half be introduced from column one by simply using the words "to pay the rent," when it can operate as a perfect covenant just as it stands, without resorting to column two to say what it means.

The second section of the statute says, "Any deed or part of a deed, which fails to take effect by virtue of this Act, shall, nevertheless, be as effectual to bind the parties thereto, so far as the rules of law and equity will permit, as if the Act had not been made." The covenant referred to may, I think, take effect without reference to the statute.

Then the words "and to pay taxes" being the words of the schedule, and all the words of column two of the schedule, I think the words opposite them in column two of the schedule are introduced. The same effect will also be given to the words, "and will not assign or sub-let without leave."

The words in the first column of the schedule, No. 9, are as follows: "Proviso for re-entry by the said lessor on non-payment of rent or non-performance of covenants."

In the lease under consideration it is, "Proviso for re-entering by the said lessor on non-performance of covenants, or seizure, or forfeiture of the said term for any of the causes aforesaid."

The first part of the proviso, according to column two of the schedule, is, "Provided always, and it is hereby expressly agreed, that if the rent hereby reserved, or any part thereof, shall be unpaid for fifteen days after any of the days on which the same ought to have been paid, although no formal demand shall have been made thereof," then the lessor may re-enter. There is a covenant to pay rent in the lease. Suppose a breach of this covenant. Is the right of re-entry for the non-payment of rent, to be exercised according to the schedule, column two; or is that



right to be exercised according to the course of the Common Law, and must a demand be made on the last day of payment of the rent at a reasonable time before sunset?

It seems to me that the way in which the various matters in this proviso would be carried out if the statutory effect is to be given to these words in part only, would be very embarrassing, and in almost any view that can be suggested there are obstacles to carrying it out in that manner. The only safe and reasonable view for carrying out the intention of the Legislature, is to adhere strictly to the mode pointed out by the statute for the purpose of making the words in the second column of the schedule apply to deeds purporting to be executed under the Act.

The original lease was made 1st July, 1868, "in pursuanc<sup>e</sup> of an Act to facilitate the leasing of lands and tenements," between the Hon. John Hillyard Cameron, of the first part, and John O'Connor, of the second part—and as to the covenants necessary to be considered is in the following words: "And the said lessee, for himself, his heirs, executors, administrators, and assigns, hereby covenants with the said lessor, his heirs and assigns, to pay rent, and to pay taxes, *and will not assign or sub-let without leave.*"

The material parts of this lease to be considered for the purpose of this suit, supposing it to be made under the statute, may be recited thus: And the said John O'Connor, for himself, his heirs, executors, administrators, and assigns, hereby covenants with the said John Hillyard Cameron, his heirs and assigns, to pay the rent hereby reserved in manner hereinbefore mentioned; and also will pay all taxes, rates, duties, and assessments whatsoever, whether municipal, parliamentary, or otherwise, now charged, or hereafter to be charged, upon the said demised premises, or upon the said John Hillyard Cameron, his heirs and assigns, on account thereof. And it is also hereby agreed (the effect would be the same if the covenant, as above limited, were considered as applying to this, the same as if No. 7 immediately followed No. 5,) that the

(lessee) said John O'Connor, shall not, nor will, during the said term, assign, transfer, or set over, or otherwise, by any act or deed, procure the said premises, or any of them, to be assigned, transferred, set over, or sub-let, unto any person or persons whomsoever, without the consent in writing of the said John Hillyard Cameron, his heirs or assigns, first had and obtained; and also, that if the term hereby granted shall be at any time seized or taken in execution, or on attachment by any creditor of the *lessee*, or if the said lessee shall make any assignment for the benefit of creditors, or become bankrupt or insolvent, or shall take the benefit of any Act that may be in force for bankrupt or insolvent debtors, this lease and demise shall immediately become forfeited and void, but the current quarter's rent shall nevertheless be at once due and payable. Proviso for re-entering by the said lessor on non-performance of covenants, or seizure, or forfeiture of the said term, for any of the causes aforesaid.

The result is, that by this lease the executors, administrators, or assigns of the lessee, are not in terms bound to obey the covenants in relation to acts of their own, though the executors and administrators may be bound for breaches of covenant by the lessee. And as to covenants running with the land, they may be bound though not mentioned.

In 1 *Williams* on Executors, 7th ed., 941, many of the cases on the subject of covenants restraining the alienation of lands mentioned in a lease are referred to. The learned author says: "But if the executors or administrators are not *named* in the proviso or covenant, it may be doubted whether the restriction will extend to them. Thus in an anonymous case in Dyer, p. 66 *a*, pl. 8, a question was asked on these words in a lease, 'And it shall not be lawful for the lessee to give, sell, or grant, his estate and term to any person without the leave of the lessor, upon pain of forfeiture of his said term;' the lessor and lessee die, and the executor sells the term without the leave of the heir: and it was holden, that this is out of the case of forfeiture, because the restraint was only during the lives of the lessor and

lessee. So in *Seers v. Hind*, 1 Ves. Jr. 294, Lord Thurlow said, 'If A lets a farm to B with covenant not to alien, and B dies, may not his executors dispose of it? I think it has been determined that they may; and I have always taken it as clear law. It is an alienation by the act of God. I remember Lord Camden entered into the question much in the same way. He took it to be clear law, that an alienation by death could not be a forfeiture.' \* \* But where a lease was made for years upon condition that the lessee, his executors or assigns should not alien without the consent of the lessor, an assignment by the administrator of the lessee was held a breach of the condition; on the ground of the administrator being an assignee within the condition."

"If a lease be made, on condition that the lessee shall not alien without the license of the lessor," in this case the restraint shall continue only during the lives of the lessor and lessee, and no longer: *Shep. Touch.* 145.

If a lease for years be made, on condition that the lessee shall not assign, or alien, the term, or the land, during his life, without license of the lessor, and the lessee doth give it by his will without license, this is a breach of the condition, and a forfeiture of the estate. But if he make an executor of his will only, this is no breach; for there is not any alienation, but merely a devolution by act of law. \* \* And if the condition be, that the lessee shall not alien, and he die, and his executor alien, this is no breach of the condition, for the condition is not extended to the executor": *Shep. Touch.* 144. See also *Woodfall's, L. & T.*, 10th ed., 548; *Smith's Real and Personal Property*, 4th ed., 694.

The leaning of the authorities certainly seems to be that unless the administrators or assigns are named, that their acts would not be considered as avoiding the lease.

The recent case, however, of *Williams v. Earle*, L. R. 3 Q. B. 739, seems to lay down doctrines that would carry these covenants along so that a breach of them could be sued for, though the acts of the executors and assigns were not covenanted against in the lease.

Blackburn, J., said, at p. 749, in giving the judgment of



the Court: "This is an action by the lessor against the assignee of a lease, for breach of covenants in the lease, and the rule has been well established ever since *Spencer's Case*, 5 Rep. 16, that, when covenants are contained in a lease (at all events if, as in the present case, the covenants are on behalf of the lessee and his assigns), and the covenants touch or concern the land, although the original covenants are made by the original lessee with the lessor, yet they run with the land, and there being a privity of estate between the assignee and the lessor, the lessor may sue the assignee for breach of any of them. But this is only in the case of a covenant which 'touches or concerns' the land."

He then refers to the covenant by which the lessees covenant that neither they nor their assigns will assign the lease without consent; and having assigned the lease, whether that is a covenant which touches or concerns the land, and therefore runs with it and binds the defendant.

He then proceeds: "I have been unable to perceive, \* \* any reason why this covenant should not be considered a covenant touching and concerning the land. It is an express covenant as to who shall have and occupy the land, and it is inserted with the view that the landlord shall not be deprived of a voice as to who shall be substituted for the original lessee in possession of the landlord's premises. It is certainly very material as touching the interest of the landlord and tenant, and touches and concerns the thing demised quite as directly as many covenants that have been held to do so." He then refers to several decisions on points such as covenants to renew a lease, covenants to reside on the demised premises, showing that these covenants have been held to run with the land.

If the covenant not to sub-let runs with the land, a breach of it by the administrator would seem to be contrary to the covenant, even if he were not specially named in it, though the estate for years might, on the death of the lessee, vest in his executor or administrator.

Mr. Justice Blackburn, however, in the subsequent case



of *West v. Dobb*, L. R. 4 Q. B., at p. 637, refers to the argument in that case as to the construction of the covenant in the lease only being a personal restriction on the lessees not affecting the assigns, or whether it was a covenant running with the land and binding every assign. In the view the Court took in that case, it was not necessary to decide the point, but in a note the reporter says that Mr. Justice Blackburn protested against the judgment in *Williams v. Earle* being taken to have decided more than that the covenant ran with the land and bound the assign, assigns being mentioned; that fact being expressly pointed out in his judgment.

The effect of the covenant in the lease not being in terms to bind the administrator or assigns, but to bind the lessee himself, the proviso for the breach of the covenant would not operate to avoid the estate, according to what I understand to be the result of the decided cases.

If, however, this covenant as to assigning be considered as running with the land, and therefore binding on the administrator, without the covenant having been made in reference to his acts, the next question would be, whether the breach of the covenant not to assign or sub-let would allow the lessor to re-enter for the non-performance of that covenant.

This is not an affirmative covenant, and much skill and learning was displayed in some of the old cases, when a breach of a covenant created a forfeiture, in limiting the operation of the covenant.

Even as late as the case of *West v. Dobb*, in the Exchequer Chamber, L. R. 5 Q. B., at p. 464, Kelly, C. B., said: "The proviso is for re-entry 'in case the lessees should fail in the observance or performance of the covenants on their part.' It would seem only to refer to failure in the performance of affirmative covenants, whereas the covenant in question is a negative covenant, not to do a particular act; and it may be extremely doubtful, more particularly in a case of forfeiture, whether such a proviso would apply to a negative covenant."

Channel, B., said, p. 465: "There can be no forfeiture, and the term must still remain in force, unless this proviso for re-entry applies. And it appears to me pretty clear that the proviso applies only to the breach of an affirmative covenant. The covenant in question is a negative covenant, and therefore the case would not be brought within the operation of the proviso."

In *Croft v. Lumley*, 5 E. & B. 671, the Chief Baron, then Sir Fitzroy Kelly, who argued the case for the defendant, suggested that certain covenants were negative. Lord Campbell said, "Assuming the parties intended to point to default in performance of any covenant, positive or negative, what other words could they have used to express that intention;" and in giving the judgment of the Court, he said, p. 677: "We approve of the rule for the construction of covenants in a lease to be enforced by a proviso of re-entry, as laid down in *Doe d. Davis v. Elsam*, Moo. & M. 189, and *Doe Muston v. Gladwin*, 6 Q. B. 953."

In *Croft v. Lumley*, nothing turned on the question as to whether the covenant was an affirmative or negative one. When the default is in the performance of positive covenants, then the proviso for re-entry applies. See *Doe d. Abdy v. Stevens*, 3 B. & Ad. 299; *Doe d. Mitchinson v. Carter*, 8 T. R. 57, as to forfeiture of conditions of lease.

In *Doe d. Davis v. Elsam*, 1 Moo. & M. 189, the provision was that the plaintiff should re-enter if the lessee, his executors, &c., should carry on the business of a pork butcher on the premises, or if any auction should be had on the premises, or use of them for the sale of pork. Lord Tenterden said: "I do not think provisos of this sort are to be construed with the strictness of conditions at Common Law. These are matters of contract between the parties, and should, in my opinion, be construed as other contracts. The parties agree to a tenancy on certain terms, and there is no hardship in binding them to those terms. In my view of cases of this sort the provisos ought to be construed according to fair and obvious construction, without favour to either side."

In *Doe d. Muston v. Gladwin*, 6 Q.B. 953, there was a covenant by lessee at his expense, from time to time, well and sufficiently to insure, and continue insured, in the joint names of himself and lessor, the buildings against damage by fire. Then there was a proviso of re-entry if the lessee or his executors should not perform all the covenants. The lessee insured in his own name, with the assent of the lessor, but the assignee of the lessor did not assent. After the assignment, the assignee insured up to Christmas, 1842. But being a continuing covenant, the breach after that enabled the plaintiff to recover in ejectment. The ruling of Lord Tenterden in *Doe d. Davis v. Elsam*, 1 Moo. & M. 189, was approved, and though the action was considered unusually harsh, the plaintiff was held entitled to succeed.

In *Fox v. Swann*, Styles 482, referred to in argument in *Doe d. Mitchinson v. Carter*, 8 T. R., at p. 59, a devise of the term by the lessee was held not a breach of the covenant.

In *Doe d. Goodbehere v. Bevan*, 3 M. & S. 353. Goodbehere demised the premises to one Shaw, who covenanted that he, his executors, administrators, or assigns, should not, during the term, assign the indenture, or his interest therein, or underlet the premises to any person without the consent in writing of the lessor. Proviso in case Shaw, his executors, administrators, or assigns, should part with his or their interest in the premises contrary to his covenant, that the lessor might re-enter. Shaw became a bankrupt. The lease was sold by order of the Lord Chancellor.

In argument it was said, p. 354, citing Moore 44, pl. 136, "That a covenant by the lessee, for him and his assigns will bind his administrator;' yet, \* \* an administrator is as much an assignee appointed by statute, as the assignee of a bankrupt \* \* \* If the proviso extend to the lessee only, then the assignees in law are not within it \* \* but it is otherwise if they be named, for then they, as well as the lessee, are bound by it. That was so held in *Roe v. Harrison*, 2 T. R. 425." It was held the proviso only extended to voluntary assignees, in contradistinction to

assignees by operation of law. An executor is a volunteer, and may wholly renounce, and an administrator is wholly voluntary.

Now, construing the proviso here in its bald terms, for re-entering by the said lessor on non-performance of covenants or seizure or forfeiture of the said term, for any of the causes aforesaid, I do not think we can satisfactorily hold that the estate which was vested in the lessee and his administrator, was forfeited by the conveyance thereof, executed by the latter to the person under whom the defendant holds.

On the whole, I think, sitting in this Court, the weight of authority is in favor of holding that the covenant by the lessee does not bind his administratrix, and that the assignment by her of the lease is not such a breach of the covenant as gives the plaintiff the right to re-enter under the proviso for that purpose, as contained in this lease.

If sitting in a Court of Appeal, I should be much pressed with the views of Sir Colin Blackburn, in the judgment referred to, that the covenant not to assign or sub-let is one that runs with the land, though the lessee does not covenant for his executors, administrators, and assigns, that they will not assign or sub-let; and when there is a clear proviso that for the breach or non-performance of such a covenant the lessor may enter, though the covenant broken is a negative one, I think, nevertheless, the breach of it would give the right to re-enter. The observations of Lord Tenterden, in *Doe d. Davis v. Elsam*, 1 Moo. & M. 139, followed by *Doe d. Muston v. Gladwin*, 6 Q. B. 953, approved in *Croft v. Lumley*, 5 E. & B. 671, seem to me to be reasonable, and such as should be acted on.

I think the rule should be absolute to enter a verdict for the defendant.

WILSON, J.—The lease is by indenture, and it is said to be made “in pursuance of the Act to facilitate the leasing of lands and tenements.”

The covenant in question is expressed as follows :



“And the said lessee for himself, his heirs, executors, administrators, and assigns, hereby covenants with the said lessor, his heirs and assigns, to pay rent and to pay taxes, and will not assign or sub-let without leave. \* \* \* Proviso, for re-entering by the said lessor on non-performance of covenants or seizure or forfeiture of the said term for any of the causes aforesaid.”

The objections to the plaintiff's claim are—1. That the statute is mis-described; the proper title of it is, “An Act respecting short forms of leases,” Consol. Stat. U. C. ch. 92.

2. That the lease does not use the short form of words in column one of the statute, so that the expanded form in column two cannot here be referred to.

3. The proviso is not for re-entry as in column one of the statute, but for re-entering.

4. The right of re-entry does not by the lease apply to negative covenants at all—it is only for non-performance of covenants. Here the forfeiture is claimed not in respect of not doing anything the party was to have done, but for doing something it is said he was not to have done.

5. The lessee covenanted only that he would not assign, not that his executors or administrators, or their assigns would not do so; and here the lessee did not assign,—it was his administratrix.

6. The assignee not being named, he cannot take advantage of the right of re-entry, as the covenant is personal and collateral, and does not run with the land.

As to the first objection, the reference in the lease is made to the title of the original Act 14–15 Vic. ch. 8, intituled “An Act to facilitate the leasing of lands and tenements.” The title has been varied by the consolidation, and it is now “An Act respecting short forms of leases.”

The statute speaks of deeds “expressed to be made in pursuance of this Act or referring thereto.” The form of deed in the Act refers to the Act by its true title. “The Act respecting short forms of leases.” The heading of the second schedule is, “Directions as to the form in this schedule, in case of the leasing of lands and tenements.”

The title is no part of the statute. That remains as it was. The Act relating to statutes, has made the preamble a part a part of it. I am of opinion the Act, for the purposes of this case, has been sufficiently referred to.

The second objection is, the lease does not use the short forms of words in column one.

The covenant begins in the lease, "And the said lessee *for himself, his heirs, executors, administrators, and assigns, hereby* covenants with the said lessor, *his heirs and assigns, to,*" &c., while in the first column referred to the words above italicised are not stated.

The meaning of the above words which are not italicised, and which are in column one, is as follows: "And the said lessee doth hereby for himself, his heirs, executors, administrators, and assigns, covenant with the said lessor that he the said lessee, *his executors, administrators, and assigns,*" will pay rent, or will not assign, &c.

The words in column two just given, and which are italicised, are not contained in the covenant in the lease; and I am of opinion that, as there is so important a difference between the two forms—that of the lease binding the lessee, his heirs, executors, administrators, and assigns, for the lessee's own personal acts—while the schedule form binds not only the lessee and his heirs, executors, and administrators, for his personal acts, but binds the executors, administrators, and assigns of the lessee respectively, for their respective personal acts—that the lessor cannot have recourse to the expanded form of the statute, as he has not been guided by it, but must be governed by the particular words used in the lease, as he has omitted by design or otherwise to bind the executors, administrators and assigns of the lessee, for their respective personal acts.

As to the third objection, I think there is no difference, in this case at any rate, between *re-entering* and *re-entry*.

As to the fourth objection, the right of entry is given for non-performance of covenants; that is, for *not* doing something which the lessee had engaged to do. It is not given for the lessee *doing* something which he

was not to have done. The act complained of here is not that anything should have been performed, which has not been done, but that something has been performed which should not have been done; and so it is not within the words of the proviso. That in effect determines this action: *Doe d. Abdy v. Stevens*, 3 B. & Ad. 299; *West v. Dobb*, L. R. 5 Q. B. 460.

The case may end here, for even admitting that the covenant extends to the assigns, although they are not named in it, the covenant itself is not within the terms of the proviso, which confers the right of entry for the breach of it. And it is not necessary to determine whether this covenant, without the word *assigns*, will bind the assigns or not. There are many authorities that it will not; there are some to the effect that it will.

If I had to give an opinion upon it, it would probably be that such a covenant not to assign, without license first given for the purpose, was one which did touch and concern the land; and I should rely upon the 6th resolution in *Spencer's Case*, 5 Rep. 16, 1 Sm. L. C. 60, and upon *Tatem v. Chaplin*, 2 H. Bl. 133; *Roe d. Bamford v. Hayley*, 12 East, 464, 468, 469, and the reasoning in *Williams v. Earle*, L. R. 3 Q. B. 739. It seems the point is not considered to have been definitely determined yet: *West v. Dobb*, L. R. 4 Q. B. 634, 637.

For the reasons before given, I am of opinion the rule must be made absolute to enter a verdict for the defendant.

MORRISON, J., took no part in the judgment, being engaged at an Assize.

*Rule absolute.*

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## MEMORANDA.

During this term the following gentlemen were called to the Bar:—

JAMES FREDERICK LISTER, NELSON GORDON BIGELOW,  
ALEXANDER STRONACH WINK, GEORGE ROBERT HOWARD,  
FRANCIS EDWARD PHILIP PEPLER.



During the vacation succeeding this Term, and on the 8th of October, His Excellency the Administrator of the Government of Canada was pleased to make the following appointments :—

The Honourable WILLIAM BUELL RICHARDS, heretofore Chief Justice of Ontario, to be Chief Justice of the Supreme Court of Canada.

The Honourable WILLIAM JOHNSTON RITCHIE, heretofore Chief Justice of the Supreme Court of New Brunswick, to be a Puisne Judge of the said Court.

The Honourable SAMUEL HENRY STRONG, heretofore one of the Justices of the Court of Error and Appeal for Ontario, to be a Puisne Judge of the said Court.

The Honourable JEAN THOMAS TASCHEREAU, heretofore one of the Puisne Judges of the Court of Queen's Bench, Quebec, to be a Puisne Judge of the said Court.

The Honourable TELESOPHORE FOURNIER, a member of the Queen's Privy Council for Canada, one of Her Majesty's Counsel learned in the law for the Province of Quebec, to be a Puisne Judge of the said Court.

The Honourable WILLIAM ALEXANDER HENRY, one of Her Majesty's Counsel learned in the law for the Province of Nova Scotia, to be a Puisne Judge of the said Court.

THOMAS MOSS, of the City of Toronto, in the Province of Ontario, and of Osgoode Hall, one of Her Majesty's Counsel learned in the law for the said Province, to be one of the Justices of the Court of Error and Appeal of Ontario, *vice* the Honourable Samuel Henry Strong, appointed a a Puisne Judge of the Supreme Court of Canada.

ROBERT ALEXANDER HARRISON, of the City of Toronto, in the Province of Ontario, and of Osgoode Hall, one of Her Majesty's Counsel learned in the law for the said Province, to be the Chief Justice of Ontario, *vice* the Honourable William Buell Richards, appointed Chief Justice of the Supreme Court of Canada.

ROBERT CASSELS, junior, of the City of Ottawa, in the Province of Ontario, Esquire, an Advocate of the Province of Quebec, and of Osgoode Hall, in the Province of Ontario, Barrister-at-Law, to be the Registrar of the Supreme Court of Canada.

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## SITTINGS IN VACATION

### AFTER TRINITY TERM.

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MACLENNAN ET AL V. ROYAL INSURANCE CO.

*Lease of rooms—Covenant for quiet enjoyment—Locking street door.*

The plaintiffs declared upon the covenant for quiet enjoyment in a lease to them by defendants of a flat in a building, above the flat occupied by defendants, together with all passages, ways, &c., to the said rooms belonging, alleging that defendants had disturbed them in their possession.

Plea, in substance, that the rooms were part of a large building, in which there were other rooms used as offices, to which access was obtained from the street by the door and staircase, which were used by the other tenants in common with the tenants of the rooms leased to plaintiffs: that the whole building was in charge of a caretaker employed by defendants who were landlords of the whole and for the safety and convenience of all, kept the key of the street door, and locked it after the usual office hours, after which the plaintiffs could at all reasonable times get the key and access to their rooms: that the demise was made subject to the right to use said door by defendants and the other tenants; and that the disturbance alleged was the locking of said door by the caretaker after office hours: *Held*, that the plea shewed no defence.

· DEMURRER. Declaration. First count: that the defendants by deed demised to the plaintiffs those certain rooms or offices situate in the Royal Insurance Company's Buildings, on the corner of Yonge and Wellington streets, in the City of Toronto, being the whole flat immediately over that occupied by the defendants, together with all rights, members, and appurtenances, passages, ways, liberties, privileges, easements, and appurtenances to the said rooms or offices belonging or in any wise appertaining, to hold for three years from the fourth day of December, 1871, at the rent thereby reserved, and subject to the covenants and conditions therein contained; and the defendants thereby covenanted with the plaintiffs, that they, the plaintiffs, and their executors, administrators, and assigns, paying the rent thereby reserved and performing the covenants therein con-

tained to be by them performed, should and might peaceably possess and enjoy the said demised premises for the term thereby granted, without any interruption or disturbance from the defendants or any other person or persons, lawfully claiming by, from or under the defendants. And all conditions were fulfilled, and all times elapsed, and all things happened necessary to entitle the plaintiffs to maintain this action for the breach hereinafter mentioned; yet after making the said demise, and during the said term, the defendants at many and divers times during the said term wrongfully interrupted and disturbed the plaintiffs in their possession of the said rooms or offices; whereby the plaintiffs were greatly injured in their business or profession and were put to great trouble, inconvenience, and annoyance, and were obliged to employ a certain careless and incompetent servant of the defendants as a caretaker of the said rooms or offices, and whereby the plaintiffs were prevented from obtaining access for any other person at the times usual and proper for the performance of such duties; and the plaintiffs had to pay a larger sum to the said servant of the defendants as aforesaid than they would have had to pay to other persons, whom they would have employed but for the wrongful acts of the defendants aforesaid.

Second count: that the defendants by deed demised to the plaintiff certain rooms or offices at the rent thereby reserved, and the plaintiffs by reason thereof were entitled to have for themselves, their partners, clerks, and servants, free access into and out of the said rooms or offices, by a certain door in the said messuage or tenement up and down the stairs and stair case leading to the said rooms or offices. And all conditions were fulfilled, necessary to entitle the plaintiffs at all times during the said term to the said access as aforesaid, and to maintain this action for any interference with the same, yet the defendants during the said term wrongfully hindered, prevented and obstructed the plaintiffs, their partners, clerks and servants, at many and divers times, from obtaining access to the said rooms or offices so demised to the plaintiffs as aforesaid, whereby the plaintiffs



were greatly injured in their business or profession, and were put to great trouble, inconvenience and annoyance, and were obliged to employ a certain careless and incompetent servant of the defendants as caretaker of the said rooms or offices, &c., (as in the first count.)

Third count: that the plaintiffs were possessed of three rooms in a certain house, situate in the City of Toronto, by reason whereof they were entitled to have for themselves their partners, clerks, and servants, free access into and out of the said rooms by a certain door of the said house, up and down the stairs and stair case leading to the said rooms, yet the defendants at many and divers times wrongfully hindered, prevented and obstructed the plaintiffs from such access as aforesaid, by locking and barring the said door, whereby the plaintiffs were greatly injured in their said business or profession, and were put to great trouble, inconvenience, and annoyance, and were obliged to employ a certain careless and incompetent servant of the defendants as a caretaker of the said rooms or offices, &c., (as in the first count.)

Eighth plea to the said declaration: that the said rooms in the first, second, and third counts mentioned are the same rooms, and the possession thereof by the plaintiffs in the third count mentioned is a possession to which the plaintiffs were entitled by reason of the demise in the first and second counts mentioned, and not otherwise, and that the said rooms are part of a large building in which there were and are divers other rooms used as lawyers' and other offices, to which access was obtained from the street by means of the said door, stairway, and staircase, which had been used before the said demise in the said first and second counts mentioned, and the possession of the plaintiffs in the third count mentioned, and were so used at the respective times aforesaid by the tenants and occupants of the said other rooms in common with the tenants and occupants of the rooms and offices in the said several counts mentioned; and that the said building was under the care and charge of a caretaker in the employment of the defendants, who

were the landlords of the whole building, and for the safety and convenience of the whole kept the key of the said door, the same being the door communicating with the street, and locked the said door after the usual office hours ; and after such office hours the said plaintiffs and all other tenants could at all reasonable times get the key of the said door from the said caretaker and access to their respective rooms and offices ; and the said demise in the said first and second counts mentioned was made, and the said possession of the plaintiffs in the said third count mentioned, was given subject to the right to use the said door, stairway and staircase by the defendants and the said other occupants and tenants of the said rooms of the plaintiffs, and the said other rooms in the said building in common, and not exclusively by the plaintiffs ; and the interruption and disturbance in the first count, and the hindrance, prevention, and obstruction of the plaintiffs in the second count, and the hindrance, prevention, and obstruction by locking and barring the said door in the third count mentioned, were and are the locking of the said door by the said caretaker of the said building after office hours and not otherwise. And except as aforesaid the defendants did not in any manner interfere with or prevent the plaintiffs use, enjoyment, and occupation of the said rooms, or the said door or stairway.

Demurrer to the eighth plea, on the grounds, that the said plea confesses, but does not avoid the matter of the plaintiff's declaration.

Joinder.

September 24, 1875, the demurrer was argued by *M. C. Cameron*, Q.C., for the defendants, and *MacLennan*, Q.C., contra.

October 1, 1876. GALT, J.—In the absence of authority I am of opinion that the plea demurred to should be allowed, and that the plaintiffs should take issue on it. The allegations contained in it may or may not be held to constitute a defence when all the circumstances are before the

Court. It is impossible to say without evidence whether what is alleged in the declaration was an unreasonable interference with the enjoyment by the plaintiffs. At the same time it cannot be urged that they have the right to have the premises left open at all hours of the day or night, without knowing in what manner the premises had been used before the demise to them.

With a good deal of hesitation I have come to the conclusion that I ought not, as far as I at present understand the law, over-rule this plea.

The best exercise of discretion, I think, is to allow the parties to take issue on the facts. It will then be for the Court to say how far the facts proved constitute a defence.

Demurrer over-ruled, with leave to the plaintiffs to take issue on the plea.

*Judgment for defendants on demurrer.*

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From this judgment the plaintiffs appealed, and on November, 22, 1875, the demurrer was re-heard before the full Court.

*MacLennan*, Q. C. The demise alleged in the pleadings is an absolute demise, and the plea does not set up that the demise was subject to the right to enforce any such regulations as the defendants now insist upon. No demise with such regulations could be assented to by tenants, and no custom could ever arise that would sanction them. The plea is no answer to the declaration.

*J. H. Cameron*, Q. C., read the pleadings and submitted that the pleas were an answer.

MORRISON, J.—There is no doubt in my own mind, upon hearing the plea read, that there must be judgment for the plaintiffs.

WILSON, J., concurred.

Rehearing allowed.

*Judgment for plaintiffs on demurrer.*

IN THE MATTER OF OWEN NEILLY AND GEORGE ADDISON,  
AND THE CORPORATION OF THE TOWN OF OWEN SOUND.*Billiard tables—Power to regulate and license.*

A by-law fixing the sum to be paid for a license for billiard tables in a town at \$300, and enacting that it should be unlawful to have any internal means of communication between a room in which a billiard or bagatelle table was kept, and any place in which spirituous liquors might be sold; *Held*, valid: that the sum charged was not excessive: that such a by-law was properly submitted to the electors under 37 Vic. ch. 32, sec. 23, O., which was not confined to tavern licenses; and that the enactment as to means of communication, was within the power to regulate and govern, and was not unreasonable.

On the 31st of August, 1875, *R. A. Harrison*, Q. C., obtained a rule *nisi*, calling on the Corporation of the Town of Owen Sound to shew cause why by-law No. 202, entitled "A by-law to repeal the by-law of the town of Owen Sound, which authorizes the granting of licenses for billiard tables," should not be quashed with costs, on the ground that it was *ultra vires* of the corporation, and because the corporation had no power to prevent the use of billiard tables in the town. 2. Why by-law No. 206, "Respecting billiard tables and bagatelle tables" should not be quashed with costs, on the ground that it was in effect a by-law to prohibit such tables, and was therefore void, and because it was unreasonable and oppressive; or, 3, why clause 6 of the last mentioned by-law, which enacted that it was unlawful to have an internal communication between a place where such tables were kept and a place where spirituous liquors were sold should not be quashed, on the ground that it was *ultra vires*, unreasonable and oppressive, and contrary to 36 Vic. ch. 48, sec. 379, sub-sec 3.

By-law 202, passed 25th of January, 1875, enacted that:—

1. "From and after the date on which the licenses for billiard tables which have heretofore been granted in the town of Owen Sound shall expire, no other or further license to keep a billiard table shall be granted in the town of Owen Sound, and from such date it shall not be



lawful to have or keep for hire in any place of public resort within the limits of the corporation \* \* any billiard or bagatelle table, or any similar table for playing any game such as billiards or bagatelle."

Section 2 provided a penalty for an infringement of the by-law.

By-law 206, passed 22nd of May, 1875, provided, sec. 1 : That licenses for billiard tables, &c., for hire or gain, or to be had or kept in a house or place of public entertainment, &c., might issue subject to the conditions in the following sections.

Sec. 2 fixed the sum to be paid for the license at \$300.

Sec. 3 provided for the form of the license, and sec. 4 required it to be exhibited, and sec. 5 prohibited betting, &c., on the game.

Sec. 6 was as follows : "It shall be unlawful to have any internal means of communication between a room in which a billiard table or bagatelle table is kept, and any place in which spirituous, fermented, or other manufactured liquors may be sold."

Sec. 7 provided that billiard saloons were to be closed at 10 p.m., and not opened before 8 a.m. The other sections provided for the duration of the license, the penalties, and for taking a vote of the electors on the by-law.

The by-law was read a first and second time, and was submitted to the electors and carried by a large majority. It was then read a third time by the council.

A number of affidavits were filed on each side, from which it appeared that a warm discussion took place in the council, those against the by-law urging that it was oppressive, and that the licensees could not afford to pay the \$300 license fee, and that in fact it was a prohibitory by-law.

October 1, 1875, *Sir John Macdonald*, Q. C., with him *R. M. Fleming*, shewed cause. The second by-law virtually repealed the first; if the second were quashed, yet the first would not be revived. The law of Parliament as to

the repeal of a repealing statute does not apply. There is nothing illegal upon the face of either by-law, and it is in the discretion of the Court to interfere or not, upon evidence *aliunde*. The Council have power under subsection 3 of section 379 of the Municipal Act, to license, regulate, and govern persons keeping billiard tables; but, in addition to this, they have power to prohibit altogether under the 35th section of the Act. As to the second by-law, it is perfectly regular on its face, and was passed properly and properly confirmed by the people, as required by 37 Vic. ch. 32. The affidavits of the plaintiffs or relators state that the license is excessive, and that no person can keep a billiard table and pay so much; but they do not give data and so enable the Court to judge of the reasonableness of the sum charged. They go too far, for they state that a billiard table keeper in Owen Sound cannot afford to pay more than \$30 for the first table, and \$15 for each additional table; but in this Province, by 50 Geo. III., cap. 6, a Provincial tax of £40 was imposed upon each billiard table used for hire; and considering the different circumstances of the country in 1810, and now, if £40 was not excessive then, \$300 is not now. This statute was not prohibitory in effect, for billiard tables continued to be used, and it became necessary to pass an enactment to prevent an evasion of the tax. In *Church v. Richards*, 6 U. C., R. 562, in addition to the Provincial duty of £40, an additional municipal charge of £10 was not looked upon as too burdensome. The by-law was passed for the purpose of diminishing the evils resulting from the resorting of young men to billiard rooms kept in places where liquor is sold, and to reduce the number of billiard saloons. This is a praiseworthy object, which is upheld by the cases. The affidavits say that certain of the councillors meant the by-law to be prohibitory. This the Court cannot enquire into. The by-law is legal, and the motives have nothing to do with it: *Borough of Freeport v. Marks*, 59 Penn. St. 257. As to the means of communication with a place where liquor is sold, there can be no question but that the council

have power to make the enactment in this by-law on that head. It properly came within their jurisdiction to regulate and govern.

*F. Osler* supported the rule. If the second by-law is removed, the first would be revived, and it is desired to get rid of both. The second by-law is practically prohibitory, and should therefore be quashed : *Barclay v. Darlington*, 12 U. C. R. 86. The 35th sub-section of sec. 379 of 36 Vic. ch. 48, does not include billiard tables, for they are not mentioned in it, but they are in sub-sec. 3 of that section. The by-law need not have been submitted to vote, for under the 37 Vic. ch. 32, the voting on a by-law fixing a license over \$130, refers only to tavern licenses.

*Sir John Macdonald* contended that that clause was general, and applied to all occupations requiring a license.

October 19th, 1875. HAGARTY, C. J. C. P.—The first objection to the by-law is, that the sum required for the license is extravagant, disproportioned to the nature and profits of the business, and in fact amounting to a prohibition,—that it is in reality a prohibition.

I feel great difficulty in acceding to the argument that \$300 is an excessive or extravagant exercise of a power.

It was well put by Sir John Macdonald in his argument, that over sixty years ago the Legislature of Upper Canada considered £40 a proper sum to pay for a license to keep a billiard table.

This amount continued to be imposed till 1853, when the Legislature transferred its licensing authority in such matters to the municipalities. It was fairly argued that sixty years ago £40 was a far larger sum relatively to the means and values current in the Province than £75 at the present time.

I do not see any good answer to this argument. If £40 was not an excessive amount at the time of the war of 1812, £75 cannot, in the judgment of any one acquainted with the value of money in Canada, be considered excessive. And in *Church qui tam v. Richards*, 6 U. C. R. 562, it was

held, that besides the £40 provincial duty, the municipality could impose a further license duty of £10.

It should be borne in mind that the trade or profession of keeping a billiard table for profit is not like that of buying or selling the necessities of life ; that it is not like a license to a butcher or a baker or a seller of fire-wood, and such like matters of daily necessity.

If this corporation imposed a license duty of £75 on every seller of firewood or of meat or bread, the effect might be to in fact prohibit the exercise of such trades, and force the inhabitants of the municipality to resort to traders outside their limits for a supply of the necessities of life.

We know of market prices for wood, meat, and bread, but we have no such knowledge as to the cost or price properly chargeable for playing billiards. It is merely a matter, not of necessity, but of pleasure or luxury.

I cannot see my way to interference on this ground, or on any of the views of the question suggested by such cases as *Re Barclay and the Municipality of Darlington*, 12 U. C. R. 86.

The next question to be considered is, the ratification of the by-law by the ratepayers.

It seems to me there has been legislation expressly bearing on this branch of the case.

The Ontario Statute of 1874, 37 Vic. ch. 32, professes to be "An Act to amend and consolidate the law for the sale of fermented or spirituous liquors," and with the exceptions of section 23, seems to confine its provisions to that object. But that section, after fixing the sum to be paid for a tavern or shop license, provides that for a tavern license the minimum in cities shall be \$100, and in towns \$80, and then, "But no by-law, by which a greater sum than \$130 per annum is intended to be exacted for any tavern or shop license, or for leave to exercise any other calling, or to do any other thing for which a license may be required, shall have any force or effect, unless the by-law, before the final passing thereof, shall have been



duly approved by the electors," &c., with a further provision against varying or repealing, except with the like sanction.

The same words are found in sec. 10 of the preceding Act of 1868-9, 32 Vic. ch. 32, being also an Act professing only to deal with tavern and shop licenses.

The Statute of 1853, 16 Vic. ch. 184, transfers certain duties of excise from the provincial to the municipal authorities, and specially deals with billiard table licenses.

Sec. 3, sub-sec 3, refers to by-laws for regulating billiard table keepers and the licensing of them, and sec. 4 contains words very like those now in force, requiring by-laws "to prevent the sale of wine, brandy, &c., at any place other than a house of public entertainment, or which shall require the payment of a greater sum than £10 per annum "for any license to sell the same, or to exercise any other calling, or to do any other thing for which a license may be required *under this Act*," &c., to be ratified by the electors.

This shews beyond question that such a by-law applying to billiard table licenses was allowed to be submitted to the ratepayers.

The Consolidated Municipal Act: Consol. Stat. U. C. ch. 54, sec. 247, provides for submitting by-laws as to licenses over \$100, exactly as in our last Act on the subject.

It seems impossible to hold that the plain words of the Legislature can be overlooked, merely because we find them in an unexpected place, and in an Act professing only to extend to tavern and shop licenses. We have seen that the Act of 1863, transferring the excise duties, expressly applied in terms to licenses like these. I feel constrained to hold that this by-law, directing a sum over \$130 to be paid for license to keep a billiard table, might be lawfully submitted to the ratepayers, and that their ratification has removed objections. I must, however, be distinctly understood as not deciding that the sum of \$300 was necessarily excessive. Being over \$130, it required the ratepayers' assent.

It remains to consider the objections to section 6, "It shall be unlawful to have any internal means of communi-

cation between a room in which a billiard table or a bagatelle table is kept, and any place in which spirituous, fermented, or other manufactured liquors may be sold."

The Municipal Act of 1873, ch. 48, sec. 379, sub-sec. 3, allows a by-law to be passed "For licensing, regulating, or governing all persons who, *for hire or gain*, \* \* \* keep, or have in their possession, *or on their premises*, any billiard or bagatelle table, or who keep or have a billiard or bagatelle table in a house or place of public entertainment or resort, whether such billiard or bagatelle table *is used or not*," &c.

Two classes of persons seem aimed at by this sub-section. 1st. Those who keep a billiard table for hire or gain, and those who keep a billiard table in a house of public entertainment or resort, whether used or not. The objectors to this by-law keep a table for hire or gain.

I do not see why, under the statutable authority to "regulate and govern," the municipality may not enact the regulations contained in the 6th section.

It was argued that the statute recognizes the keeping of a billiard table in a house of public entertainment, and that, therefore, it cannot be lawful to cut off internal communication.

To this it may be answered that it cannot be considered unreasonable, under a general power "to regulate and govern" to insist on there being no internal communication • with any place in which liquor is sold. The reasons for such a provision are too obvious for more extended remark.

I am not prepared to hold the 6th section beyond the powers conferred by the statute.

If they can "regulate and govern" the keeping of a billiard table, I think it within their powers to insist that whether the billiard room be in a house of public entertainment or not, there shall be no internal communication with any place in which liquor is sold. If a tavern keeper wishes to have a billiard room in his public house or premises, I think he may be properly required to cut off internal communication with the part of his premises where he sells liquor.

It was conceded that if the second by-law be upheld, it was unnecessary to consider the first.

*Rule discharged with costs.*

IN THE MATTER OF CHARLES STERN, AN INSOLVENT—  
ASCHER & CO., CLAIMANTS.

*Insolvency—Composition and discharge—Securities.*

After an assignment in insolvency in 1875, a deed of composition and discharge was executed, by which the insolvent covenanted to pay 30 cts. in the \$, and give each creditor endorsed notes therefor, and the creditors in consideration thereof released him from all their respective claims, "saving and reserving the rights which any of them may have against any other person, or in respect of any security held by them or any of them."

A. & Co., who were creditors executing the deed, had a claim amounting to \$2,758, for \$800 of which they held collateral security in the shape of promissory notes, all over due except one for \$52. The composition on their claim, amounting to \$827, having been placed in the assignee's hands for them:—*Held*, that A. & Co. were entitled to it in full, and to retain their securities, and were not bound to value said securities.

APPEAL from the County Court of the County of York.

Ascher & Co., creditors of the insolvent, applied to the County Court of York, by petition, supported by affidavits, for an order to compel J. B. Boustead, the assignee in insolvency of Stern, to pay over to them, the petitioners, \$827.51, placed in his hands by the insolvent to answer the claim of the petitioners.

It appeared by the petition that on the 25th of January, 1875, Stern assigned under the Act to J. B. Boustead, an official assignee: that subsequently an arrangement was entered into between Stern and his creditors, by which Stern was to pay a composition of thirty cents on the dollar, and obtain a discharge, and a deed was drawn up embodying the agreement, and was effectively executed, and the defendant was discharged on the 7th of August, 1875; that the claimants were parties to the deed and proved their claims, amounting to \$2,758.38, and \$827.51 was placed by

the insolvent in the assignee's hands to meet the claim of Ascher & Co., in accordance with the terms of the deed; but that the assignee, Boustead, though often requested, refused to pay over the money.

The deed of composition and discharge, which was dated 15th of February, 1875, provided that, in consideration of his indebtedness and of the discharge, the insolvent covenanted that he would pay the composition of thirty cents as agreed, and that he would give to each creditor who asked and required the same endorsed promissory notes for the said amounts, &c. And in consideration of the payments and notes, the creditors, and each of them, "do, and each of them doth release and discharge unto the said insolvent all their respective claims against him, (saving and reserving the rights which any of them may have against any other person, or in respect of any security held by them, or any of them)," &c.

From the affidavits and papers filed it appeared that the claim of Ascher & Co. was made up of

Open account.....	\$1,957 86
Other accounts .....	800 52
	<hr/>
	\$2,758 38

and for the \$800.52 it appeared that Ascher & Co. held collateral security, in the shape of promissory notes which were overdue and unpaid, except one note for \$52.82, which had been renewed and was outstanding.

On August 3rd, 1875, an order was made by the learned County Judge for Ascher & Co. to value the securities held by them.

On September 4th, 1875, a summons was obtained from Duggan, County Judge, calling on the assignee, Boustead, to shew cause why he should not pay over the sum of \$827.51, and the costs of the application.

On September 15th, the summons was discharged, with costs to be paid by the petitioners, and it was further ordered that the securities held by the petitioners should be valued in accordance with the order therefor.



From this order Ascher & Co. appealed to this Court, on the grounds :—

1. Ascher & Co., not having been parties to any arrangement between the insolvent and the assignee, the assignee was bound to pay over to them, after the confirmation of the discharge of the insolvent, all moneys paid into his hands to cover their claim. And the insolvent having obtained his discharge unopposed by them, the assignee cannot now refuse to pay the money over to Ascher & Co.

2. The order of the 3rd August not having been served on Ascher & Co., they are not bound by it, and the insolvent having elected to take his discharge before the valuation of the securities, or before any steps had been taken by the assignee under the said order to compel a valuation, and the assignee having allowed him to obtain his discharge, both he and the assignee have by their acts and omissions abandoned the said order and all benefit to be derived thereunder.

3. The insolvent having made a deed of composition and obtained his discharge thereunder, the provisions of the Insolvent Act of 1869 regarding the valuation of securities, do not apply to this case.

4. But even supposing they do, Ascher & Co. were not bound to value the notes held by them, because they were overdue and unpaid, and the insolvent was only secondarily liable on them. Under the composition deed, the insolvent expressly agreed with Ascher & Co. and his other creditors, that their rights against other persons, and in respect of any other security, should be reserved.

5. By the terms of the composition deed, Ascher & Co. could look to their securities until they had been paid in full the debt covered by their securities, and as the insolvent was only liable on these secondarily, their doing so would not cause the discharge to be partial only, inasmuch as those primarily liable on the securities could not afterwards come on him for contribution.

October 12, 1875. *L. Gordon* for appellants. This is an application made to the Judge to compel the assignee to pay over the amount received by him for the benefit of the appellants. The composition was thirty cents on the dollar. The assignee refused to pay it over, as he alleged that the appellants should, before they got the thirty cents upon about \$800 of their claims, for which they held the notes endorsed by insolvent to appellants against other persons, value these securities. There can be no valuation of securities in such a case, except under the Insolvent Act of 1869, section 60, and that applies to notes not due; and it expressly says that notes past due are not to be valued: *McMahon's* Insolvent Act of 1875, p. 146; *Re Langs*, 4 L. J. U. C. N. S. 284. There is no necessity for a creditor to prove or value securities when there is a deed of composition and discharge, but only when the proceedings go on in insolvency, and there is no deed of composition and discharge.

See also sections 55, 56, 57, 58, 59, 60, 61, 62, 63, as to valuing securities and dividends. The payments under the deed are not called a dividend, but a composition. The deed reserves the creditors' rights against others. In *Thomas v. Courtney*, 1 B. & Al. 1, there were no rights reserved, and yet the securities were held not to be cancelled nor to be given up.

*Read*, Q. C., contra. The claim of \$827.51, in respect of the notes, is not based upon promissory notes. It is a claim for goods for which the creditor holds notes of other persons, and so it is not within the section of the Act. The appellants' case must be governed on general principles: *Ex parte Brunskill*, 2 M. & Ayr. 220. The debt is the amount of appellants' claim, less the notes of others they hold.

October 12, 1875. WILSON, J. The deed of composition and discharge secures to the creditors the amount of thirty cents in the dollar on their claims against the insolvent. And it contains a release of the insolvent from all claims of the creditors, they saving and reserving their rights.

which they may have against any other person, or in respect of any security held by them.

I am of opinion that means the creditors are to be paid their composition in respect of their full claim, and to retain their securities.

Besides, these notes being overdue and unpaid, and the appellants having revalued their claim in consideration of the notes being overdue and unpaid, they were not obliged to value them or to give them up, but to prove and proceed for the whole, retaining the notes. This deed gives them that and no more, and why they should not have it I cannot understand.

I must allow the appeal, and direct that the appellants do receive the thirty cents on the dollar upon their full claim, without regard to the notes in question which they hold, and which it is expressly agreed are to be saved and reserved to them. The costs of this appeal will be allowed out of the estate, and an order will be made upon the summons issued in the Court below, giving effect to the judgment now given, which order will be made with costs, of course, to be paid to the applicants out of the estate.

*Appeal allowed.*

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## ARCHIBALD McLENNAN V. JAMES CHEGUIN.

*Agreement to convey land—Acceptance of deed—Effect of.*

Plaintiff declared on defendant's agreement to sell him certain lands, and convey the same to him in fee simple free from all incumbrances—alleging in one count that he had not so conveyed, and in another that although defendant by deed pretended to convey the land to one H., at the plaintiff's request, free from incumbrances, yet defendant had allowed part of it to be sold for taxes. Defendant pleaded, that the incumbrances were created by a former owner, of which defendant had no notice, and which he was not legally bound to pay, and that afterwards he at plaintiff's request conveyed the land to H. by a deed with qualified covenants, which the plaintiff accepted, whereby defendant was released from said agreement.

*Held*, no defence, for there was no merger, because the deed was not to the plaintiff, no release was shewn, and no accord and satisfaction.

*Quere*, as to the effect of the deed if it had been given to the plaintiff.

DEMURRER. Declaration. First count: that the defendant, on the 20th day of October, 1873, in consideration that the plaintiff would pay to the defendant the sum of \$445, as follows: \$45, part thereof, at the time of making the said agreement, and \$400, the residue, in one month thereafter, he, the defendant, agreed to grant by a good and sufficient deed in fee simple to the plaintiff, free from all incumbrances, all and singular that certain parcel or tract of land and premises known and described as lot 25, in the second concession north of the Durham Road, in the township of Bentineck, county of Grey, containing fifty acres, within one month after the said 20th day of October, 1873: that the plaintiff made the payments as and when required by the agreement; and all conditions were fulfilled, &c., necessary to entitle the plaintiff to have the said land and premises conveyed to him in fee simple, free from all incumbrances, by the defendant, yet the defendant hath not conveyed the same to the plaintiff free from all incumbrances, contrary to the said agreement.

Second count: that the defendant, in consideration of \$445, agreed with the plaintiff to grant him a clear deed, free from all incumbrances, of lot 25, &c., within one month after the 20th day of October, 1873, at which time it was agreed between the plaintiff and the defendant that the



balance of the purchase money, that is to say \$400, was to be paid, \$45, part of the said purchase money, having been paid by the plaintiff to the defendant on the said 20th day of October, 1873. And although the defendant did, by his deed bearing date the 28th day of October, 1873, afterwards pretend to convey the said lands and premises to one Richard Hoskin, at the request of the plaintiff, instead of to the plaintiff, free and clear of all incumbrances, yet at the time of the said conveyance the defendant had permitted and allowed 37 acres of the said land and premises to be sold by the Warden and Treasurer of the county of Grey for the taxes due thereon, to one Andrew Heron, and afterwards the said Warden and Treasurer duly conveyed the said 37 acres of the said land and premises to the said Andrew Heron—whereby and by reason whereof the plaintiff hath been deprived of and lost the said 37 acres of the said land, and the defendant hath not granted a clear deed of the said lot as he agreed to do as aforesaid free from all incumbrances.

Second plea to the first count: that at the time of the making of the agreement in that count mentioned, the defendant had no knowledge or notice of the incumbrance set out in the said first count, which was created by a former owner of the said land, and which the defendant was not legally or personally bound to discharge, nor had the defendant any knowledge or notice of any incumbrance whatsoever on the said lands created by a former owner thereof, and which the defendant was not legally or personally bound to discharge, and the said agreement was made by the defendant without any such knowledge or notice. And afterwards and before this suit, the defendant still being without any such knowledge or notice, and in the belief that the said lands were unincumbered by any prior owner, did, at the request of the plaintiff, by deed, wherein the covenants were limited and extended only to the acts of the defendant and those claiming under him, convey the said lands to one Richard Hoskin in fee simple; and the plaintiff, without having at any time made any

objection to the title to the said lands, accepted and received the said deed from the defendant, whereby the defendant was released from the said agreement, and from any liability to pay off the incumbrances not created by himself or for which he was legally or personally liable on the said lands.

Second plea to the second count: that at the time of the making of the agreement in the said second count mentioned, the defendant had no knowledge or notice that there were any incumbrances created by a former owner of the lands mentioned in that count, or of any incumbrances whatsoever on the said lands created by a former owner thereof, and which he was not legally or personally bound to discharge, and the said agreements were made by the defendant without any such knowledge or notice; and afterwards, and before this suit, the defendant still being without any such knowledge or notice, and without having permitted or allowed 37 acres of the said land to be sold as in the second count mentioned, and in the belief that the said lands were unencumbered by any prior owner, did, at the request of the plaintiff, by a statutory deed, wherein the covenants were limited and extended only to the acts of the defendant and those claiming under him, convey the said lands to Richard Hoskin in the said second count, mentioned in fee simple, which statutory deed is the deed mentioned in the said second count; and the plaintiff accepted and received the said deed from the defendant, without having at any time prior thereto made any objection to the title to the said lands; by reason of all which premises the defendant was released from the said agreements and from any liability in respect thereof.

Demurrer to the second plea to the first count, on the grounds:—

1. The said plea does not shew that the said land was conveyed free from all incumbrances, but on the contrary, admits that there were incumbrances.

2. That it is no answer to the said first count, or to the

breach therein alleged, that the incumbrances were created by a former owner and not by defendant, the defendant's contract being to grant or convey free from all incumbrances.

3. That the said plea does not shew that the said deed therein mentioned was delivered to or accepted by the plaintiff in satisfaction or discharge of the defendant's contract or agreement.

4. That the said plea admits the making of the agreement in said count mentioned, but does not shew any performance thereof or any release or discharge thereof or therefrom.

Demurrer to the second plea to the second count, on the grounds :—

1. That said plea does not shew that the defendant granted a clear deed of said land free from all incumbrances, but, on the contrary, said plea admits that there were incumbrances.

2. That it is no answer to the said count that the incumbrances were created by a former owner and not by the defendant, the defendant's contract being to grant a clear deed free from all incumbrances.

3. That said plea does not shew that the deed therein mentioned was accepted or received in satisfaction or discharge of defendant's said agreement.

4. That said plea admits the making of the agreement in the second count mentioned, but does not shew any performance thereof, or any release or discharge thereof or therefrom.

Joinder.

The defendant excepted to the second count of the declaration, on the ground, that no cause of action is disclosed thereby, for that the plaintiff, according to his own shewing, requested a deed with statutory covenants to be made of the land and premises in the declaration mentioned to Richard Hoskin in the said declaration mentioned, and that a deed has been made and executed by the defendant under the said agreement which the plaintiff or his assignee,

the said Richard Hoskin, has accepted, and that his remedy is confined to the covenants contained in that deed.

October 2, 1875, *S. Richards*, Q. C., for the demurrer. Defendant agreed, but not under seal, to give the plaintiff a deed in fee simple of land free from all incumbrances. Defendant says the incumbrances were made by a former owner of which he had no knowledge, and defendant at plaintiff's request conveyed the land to Hoskin with limited covenants, which the plaintiff accepted, whereby defendant is discharged.

The learned counsel was here stopped, and *Osler* was called on.

*F. Osler* contra. The plaintiff having taken a deed can only look to the covenants in the deed: *Rawle* on Covenants, 4th ed. 566. The deed to Hoskin, at the plaintiff's request, is a merger of the former agreement. It is not necessary to shew it was accepted in satisfaction and discharge: 2 *Sug. V. & P.*, 14th ed., 552-3; *McCall v. Faithorne*, 10 Grant 324; *Re Buck, Peck v. Buck*, 6 P. R. 98.

*Richards*, Q. C., in reply. If this deed were made to the plaintiff in place of to Hoskin it still would not relieve defendant from his contract made prior to the deed. It is not a merger: *Price v. Moulton*, 10 C. B. 561. It should be between the same parties to be a merger. It is not a satisfaction and discharge, because not so averred.

October 15, 1875. WILSON, J.—The pleas do not shew a merger, because the deed afterwards given was not made between the same persons who were parties to the prior contract: *Ansell v. Baker*, 15 Q. B. 20; and this plaintiff's remedy on the contract cannot be said to be merged in a deed given to another person upon which the plaintiff has no remedy, for it is not the debt or subject of suit which is merged, but the inferior remedy which merges in the greater: per Maule J., in *Price v. Moulton*, 10 C. B., 561, 573.

If the plaintiff had taken the deed to himself I am disposed to think he could not then have fallen back on the



contract and sued upon it, for what the deed did not cover, so long as the subject of the contract had been conveyed, and the only difference between the contract and the deed was that by the one a full covenant was to have been given, whereas the other was a limited covenant.

In *Pilgrim v. The Southampton and Dorchester R. W. Co.*, 7 C. B. 205, something of the same kind took place. The antecedent contract was more extensive than the subsequent deed.

And Wilde, C. J., at p. 220, said: "It was quite competent to the parties to agree for a sum to be paid as compensation for some only of the matters which had been the subject of the former agreement."

In that case the defence set up was on the deed, and not on the prior contract.

In *Price v. Moulton*, 10 C. B. 561, the taking of a deed as a security for a simple contract debt was pleaded as a merger and extinguishment of the simple contract liability.

But here the deed has not been made to the same person with whom the antecedent contract was made. It is stated to have been made at the plaintiff's request to a third person, and that the plaintiff made no objection to it, and accepted and received it, and so it is stated the defendant was released from the agreement and from all liability in respect thereof.

The plea then is not a merger, nor is it pleaded as such.

It is not a release because not under seal, and because the facts do not shew it to be a release, although it is pleaded as such.

And it is not an accord and satisfaction, nor a satisfaction alone without an accord, because it is not averred to have been given and accepted in satisfaction and discharge of the agreement.

In *Houghtaling v. Lewis*, 10 Johns. N. Y. 297, the deed was pleaded as an accord and satisfaction of the prior contract. It was there held the effect of a deed being given upon the contract made is, as a rule, to merge the remedy which there was on the contract in the one which is given

by the deed, so far as the title, possession, quantity or emblements of the land which is the subject of the contract is or are concerned, but not so as to collateral matters.

*Houghtaling v. Lewis*, 10 Johns. N. Y. 297; *Bull v. Willard*, 9 Barb. 641; *Carr v. Roach*, 2 Duer 20, and *Rawle* on Covenants, 4th ed. 566, treat the remedy on the contract as merged or extinguished by the execution of the deed to the extent before stated.

Here it may be, that notwithstanding all the plea shews, the plaintiff consented to the defendant selling the land to Hoskin, because he (the plaintiff) would not himself take it by reason of the defect of title, and it may be also that Hoskin may have paid a much less price for the land by reason of the incumbrance than the plaintiff was to have paid.

The defence attempted to be set up must operate either by way of extinguishment of the remedy on the contract or by way of accord and satisfaction of the remedy on it, and for the reasons given it can operate in neither of these ways in this case. The judgment will be for the plaintiff on the demurrer.

*Judgment for plaintiff.*

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## PARKINSON V. HIGGINS ET AL.

*Mortgage—Purchase of property by mortgagee under foreign judgment—  
Effect of.*

Declaration on a covenant to pay money. Plea, that the plaintiff sold a vessel to defendants, and that the deed containing the covenant sued on was a mortgage and reconveyance thereof to the plaintiff to secure the purchase money. Equitable replication, that the vessel was seized and libelled for wages due to her crew, and condemned and sold in Detroit, in the United States, under the Admiralty law there, and the plaintiff purchased her for about \$2300: that she was so sold without plaintiff's privity or consent: that by the foreign law the purchaser acquires an absolute and paramount title thereto, and purchased at the sale as any stranger might, and thereby bought the same absolutely, and not merely the interest or equity of redemption of the defendants therein as in the plea is alleged; and that he holds the same by title paramount, and not as a mortgagee having purchased the equity of redemption thereof; and that said mortgage did not thereby become merged and satisfied as alleged.

*Held*, on demurrer that defendant was not liable, for that the mortgagee could not sue for the mortgage money, while asserting his right to the property mortgaged wholly independent of any title derived from the mortgagor, and without any right to redeem.

DEMURRER. Declaration: that the defendants, by deed bearing date the 23rd day of April, 1873, covenanted with the plaintiff to pay to the plaintiff \$900 on the 1st day of November, 1874, together with interest at the rate of seven per centum per annum on the sum of \$2,700, from the 23rd day of April, 1873, but did not pay the same.

Pleas. 2. On equitable grounds: that before the making of the deed in the declaration mentioned the plaintiff sold to the defendant Elizabeth Jane Higgins a certain vessel called the "Perry," and the said deed was a mortgage and re-conveyance thereof to the plaintiff by the said Elizabeth and her husband, James Higgins, to secure to the plaintiff the payment of the purchase money for said vessel, and for no other consideration, and the said sum of \$900, in the declaration mentioned, is the money secured and covenanted to be paid by the said mortgage. And the defendants say that before the commencement of this action, and after the making of the said deed, the said vessel was seized at the port of Detroit, in the State of Michigan, one of the United States of America, under the

authority and by the laws of the Admiralty of the said country, and was condemned and sold, and the plaintiff thereby became the purchaser of the said vessel and is now the absolute owner thereof, and thereby acquired and now holds all the right, title, interest, and equity of redemption of the defendants thereto or therein; and the defendant Elizabeth expended, or caused to be expended, over \$3000 in repairing and improving the said vessel, and the same was at the time of such sale worth over \$3000 more than when the same was sold to the defendant Elizabeth; and the plaintiff agreed with the defendants before and at the time of the said sale, that if the defendants would permit the plaintiff to buy in the said vessel, and allow him to become thereby the owner of the said vessel, and procure a claim which then existed against, and was to be made upon, the said vessel by the defendant James Higgins to be withdrawn, that the plaintiff would release and discharge the said mortgage, and the defendants did permit the plaintiff to buy in the said vessel and to become the sole owner thereof, and did procure the said claim to be withdrawn and not enforced, whereby the said mortgage became satisfied.

3. On equitable grounds: that the deed mentioned being a mortgage, as in the last plea mentioned, and while the plaintiff was the mortgagee of the said vessel, and before the commencement of this suit, the said vessel and all the interest of the defendants therein was sold, and the plaintiff became, and was, and is, the absolute owner of the said vessel, whereby the said mortgage became merged and satisfied.

Replication, on equitable grounds, to the third plea: that the said vessel was libelled or charged and seized for wages due to the crew thereof, and was condemned and sold at the port of Detroit, as in the second plea mentioned, and the plaintiff became the purchaser thereof for a large sum of money, which, together with the sheriff's fees and other expenses connected therewith, amounted to the sum of, to wit, \$2300, or thereabouts, and the said



vessel was so sold without the privity or consent of the plaintiff: that by the said Admiralty laws the purchaser of a vessel so sold as aforesaid acquires an absolute and paramount title to the same, and the plaintiff became the purchaser of the vessel in question at said sale as any stranger might have done, and thereby bought the same absolutely, and not merely the interest or equity of redemption of the defendants in the same as in the said third plea alleged, and that he held the same by title paramount, and not as a mortgagee having purchased the equity of redemption thereof, and that the said mortgage did not thereby become merged and satisfied as in the said plea alleged.

Demurrer to the third plea, on the grounds: that the purchase by the plaintiff of the said vessel, as in the said plea alleged, does not cause such a merger of the said mortgage as satisfies the same. Joinder.

Demurrer to the replication on equitable grounds to the third plea, because:—

1. The said replication does not confess and avoid the matter set out in the said plea, nor is it in bar thereof.

2. The said replication is in substance the same as the plea, being merely the same state of facts set out more at large.

3. All the facts set out in the said replication are included in the said plea.

Joinder.

October 2, 1875. *S. J. VanKoughnet* for the plaintiff.—As to the plea: If the doctrine of merger be applicable to personal estate at all, it can only be so in analogy to the same doctrine as applied to realty, and in that case the authorities shew there is no merger unless there is an intention on the part of the mortgagee manifested that the mortgage debt shall merge in the estate acquired by him. [HAGARTY, C. J.—Though the technical term “merge” is used, is not this all that is meant by the plea, The vessel having been offered at sale, you, holding a mortgage from the defendants on her, bought her in,

and so far the mortgage became satisfied?] The plea is as well pleaded as a plea of merger as it possibly could have been, and the pleader must be supposed to have so intended it. He has no right to expect the plaintiff to treat it other than it is pleaded; it must be dealt with as it is found on the record, and not as it may possibly have been intended. But even granting that it is as suggested, it still amounts to merger in the end: it must be that or nothing, for there is no other doctrine of a Court of Equity which the defendant can under the circumstances call to his aid. Then as to this equitable doctrine, *prima facie* the mortgage will merge on the getting in of the equity of redemption, the principle being that the mortgagee being both the hand to pay and that to receive, there can be no reason ordinarily for the mortgage not sinking into the estate; so that unless kept alive or co-existent with the estate, it will merge. It is always a question of intention, and where that intention is not expressed, whatever is most for the advantage of the mortgagee will govern as to the debt merging or not. This is the law as laid down by Sir William Grant in the leading case on the subject—*Forbes v. Moffatt*, 18 Ves. 384. In the same case it is said that wherever the charge is merged there has been nothing to shew that it was not a matter of utter indifference to the mortgagee whether it did or not. Now there is nothing of this kind in the present case; on the contrary, it must be assumed to have been of the utmost importance to the plaintiff to keep his debt a subsisting one. [HAGARTY, C.J.—What is the amount of the mortgage?] About \$2,700, and the replication shews, and the Court will look at the whole record, that the plaintiff paid some \$2,300 on buying in the vessel at the foreign port; therefore, it was of every moment to him to preserve his mortgage as well. There are several cases in our own Court of Chancery on the subject of merger, on the authority of which, as well as those in England, it is submitted that the plea is clearly bad: *Elliott v. Jayne*, 11 Grant 412, 415; *Finlayson v. Mills*, 11 Grant 218; *Heney v. Low*, 9 Grant 265, 269. As to the

replication, it is contended that it is good; and that the objections to it are futile.

If necessary to cite authority in support of the foreign law, under which the vessel was sold, giving a paramount title to the purchaser, *Van Every v. Grant*, 21 U. C. R. 542, may be referred to, and the cases of *Imrie v. Castrique*, 8 C. B. N. S. 405; *Cammel v. Sewell*, 5 H. & N. 728, with the others there collected.

*O'Brien*, for the defendants. The doctrine of the Court of Equity is, that a mortgage is a mere security for the debt, and that the mortgagee cannot both hold the mortgaged property and sue for the debt: *Palmer v. Hendrie*, 27 Beav. 348; *Lockhart v. Hardy*, 9 Beav. 349. Merger is not perhaps the correct word, but the meaning of the plea is, that upon the circumstances set out in it a Court of Equity would restrain the mortgagee from suing as he had become possessed of the property, and that totally independent of any question of intention. If the plea is good the replication is bad, as all the facts stated in it might be assumed as against the defendants in their plea, and it only makes the case of the defendants stronger by distinctly claiming on behalf of the plaintiff to hold the mortgaged property absolutely, and at the same time to sue on the covenant for the debt.

November 12, 1875.—HAGARTY, C. J. C. P. The declaration is on a covenant to pay money.

The defendants, in the second plea, not now in question, aver that the plaintiff sold a vessel to them and that the deed containing the covenant sued on was a mortgage and re-conveyance thereof to the plaintiff to secure the purchase money, setting out other matters as defence.

The third plea, on equitable grounds, says, that the deed mentioned being a mortgage, as in the preceding plea mentioned, and while the plaintiff was mortgagee of the said vessel, the vessel and all the interest of the defendants therein was sold, and the plaintiff became, and was, and is the absolute owner of the vessel, whereby said mortgage became merged and satisfied.

To this the plaintiff replies, equitably, that the vessel was seized and libelled for wages due to the crew thereof, and condemned and sold in Detroit, as in the second plea mentioned, and the plaintiff became the purchaser for about \$2300: that she was so sold without his privity or consent; and that by the foreign law the purchaser acquires an absolute and paramount title thereto, and that he became the purchaser at the sale as any stranger might, and thereby bought the same *absolutely, and not merely the interest or equity of redemption of the defendants therein as in the third plea alleged; and that he holds the same by title paramount, and not as a mortgagee having purchased the equity of redemption thereof;* and that the said mortgage did not thereby become merged and satisfied as alleged.

This replication is demurred to, and the plaintiff excepts to the third plea.

There is no statement of the vessel being registered, or in any way affected by the Ship Registry laws. It therefore stands as an ordinary sale and mortgage of a chattel. There is no averment shewing in whose possession the vessel was when seized or libelled, nor by whose default the crew were not paid so as to render her liable to seizure or sale.

I do not see that section 13 of our Chattel Mortgage Act, Consol. Stat. U. C., ch. 45 can affect the case. It allows the sheriff and other officers to whom a writ, precept or warrant of execution against goods and chattels is directed, to sell the interest and equity of redemption in the goods of the execution defendant, and the sale shall convey whatever interest the mortgagor had therein. This can hardly affect the sale in the foreign country on a proceeding *in rem*, as here set up.

If, under this clause, the mortgagee of the chattels purchased the mortgagor's interest, I take it as clear that he could not sue for the money due on the mortgage. A like provision is contained in the Common Law Procedure Act, sec. 260.



The same Act (sec. 257) allows the sale by the sheriff of a mortgagor's interest and equity of redemption on a *fi. fa.* lands; and sec. 259 allows a mortgagee of realty whether plaintiff in the suit or not, to purchase at the sale, and to acquire the same rights as any other purchaser; he is then to give the mortgagor a release of mortgage debt. And if another become purchaser, and the mortgagee enforce payment against the mortgagor, such purchaser shall repay the debt to the mortgagor.

By the Consol. Stat. U. C., ch. 87, the mortgagee of freehold or leasehold property may take a release of the equity of redemption without merging his mortgage debt as against subsequent mortgagees or judgment creditors. These provisions are confined to realty and leaseholds.

I think the third plea is *prima facie* an answer to the declaration. The plaintiff acquires all the defendant's estate and interest in the vessel. That interest was to get the vessel on payment of certain stipulated moneys. The plaintiff cannot, I think, acquire such an interest, and at the same time retain the right to enforce the purchase money from defendants.

If the plaintiff had merely foreclosed the mortgage, he could, I assume, still sue at law for the mortgage money. The only effect would be to open the foreclosure. But if he obtains a decree for sale, and the sale takes place, so as to put the estate beyond his control, that I believe to be a bar.

The plaintiff, in his replication, seeks to displace the plea by asserting that he purchased and holds the vessel absolutely by title paramount, and not as a mortgagee purchasing the equity of redemption; that in fact his title is wholly independent of the relation created by the original sale and mortgage back to him.

I can only read the replication as a distinct repudiation of any right or interest remaining in the mortgagors, or any obligation on his part to allow them to redeem or acquire any interest under the mortgage.

He says the sale was without his privity or consent. It was in fact a proceeding *in rem*, and he might safely aver

it was so even if the vessel had been (as on these pleadings she may have been) in his possession, and that for his default in not paying the crew that the vessel was libelled and condemned in the foreign Court. On these pleadings it may have been wholly for his default that the sale took place.

The common doctrine is, of course, that the mortgagor on payment of the mortgage money is entitled to recover back the mortgaged estate. The latter may, however, have been lost or destroyed without the mortgagee's default—as in the case of house property wholly destroyed by fire, or of a ship wholly lost; there the mortgagor must pay on his covenant, though he cannot get back his estate.

Payment and redemption are usually reciprocal. There are cases where to a claim to redeem the mortgagee sets up that he holds the estate by title paramount, wholly independently of any right acquired through the mortgagor.

I have not seen any case where a mortgagee so situated has proceeded to enforce payment from a mortgagor.

If the defendants here filed a bill to redeem, we have to enquire whether the facts stated by the plaintiff on this record would be an equitable bar. He asserts that he purchased the whole property in the vessel, legal and equitable, by the sale in the foreign Court—that he holds her not as purchaser of the equity of redemption, but by title paramount. If this would be a good bar to the suit for redemption, I see a great difficulty in seeing how he can enforce payment.

A case, *In re Burrell*, L. R. 7 Eq. 399, before Vice Chancellor James, is somewhat in point. A mortgagee of leasehold claimed his mortgage debt against the executors of the original mortgagor. The first mortgage was by Burrell to D. D. sub-mortgaged the term to Eyton less three days. Burrell died. E. and D. both claimed in an administration suit. B.'s executors assigned their equity of redemption to D. D. further sub-mortgaged to L. D. then assigned his estate to trustees for creditors. E. filed a bill to foreclose against D.'s trustees and L. D.'s trustees disclaimed, and

L. was foreclosed. Eyton had paid the ground rent of the premises for several years, but at last ceased, and the original lessors entered. Eyton's counsel urged that he had not foreclosed Burrel's executors, and that the reversion was not in Eyton. It was argued contra that he had taken possession, paid ground rent, and it was his wrong to allow the forfeiture. That if he relied on his legal right, he must abandon his foreclosure; and that so long as he treated his foreclosure as absolute, his right of action was gone.

The Vice Chancellor said that D. only was barred from redeeming, and that his foreclosure did not in any way defeat Eyton's right to be paid out of Burrell's estate, and added, at p. 407, "It is now said that Eyton took possession, and paid rent, under his mortgage deed and foreclosure, or one of them. But that did not determine his right to have payment of the debt due to him. Then it is said, he is not in a position to restore the estate if the mortgage claim be satisfied and that, consequently, he has lost his right to enforce payment of the debt. He is not in a position to restore the estate, simply because the freeholder, by title paramount, has evicted him and everybody else. But was Eyton in default in permitting the eviction? I am of opinion he was not. It never was his duty to pay the rent, and observe the covenants. Burrell's executors were bound to pay the rent; D. was bound to pay it; but Eyton never undertook either at law or in equity to pay the rent, or observe the covenants. The entry of the superior landlord was the same in effect as if a fire or a flood had come and swept away the property. Nothing has been done to render Eyton liable. He has simply, by *vis major*, or rather, by the default of his mortgagor, been deprived of the thing which he held as a security for his debt, and which, if Burrell's executors had paid the debt, they might have recovered. There has been no default on his part; he has not received payment; he has not released the debt; and I think he is entitled to prove for the whole."

Counsel supporting this claim declared that their client was willing, so far as he could, to be redeemed.

Now, it seems clear that the sale of this vessel by the foreign Court without plaintiff's default, or the loss of the vessel by ordinary mischance, would be no bar to his right to his money. He could always aver his readiness to reconvey all right or estate remaining in him.

The whole difficulty arises from his assertion of his absolute right to the vessel, by title paramount to the mortgagors.

If mortgaged lands were sold for taxes without the mortgagee's default, it would be no bar to his right to his money, though the estate could not be restored.

If the mortgagee should purchase at the tax sale, he would have two courses open to him. He might either treat the estate as still open to redemption, and aver that he only bought for his own and the mortgagor's protection, and claim to add the sum paid to his mortgage claim; or he might, as here, I presume, insist that he was absolute owner by title paramount.

In *Kelly v. Macklem*, 14 Grant 29, the claim, as I gather from the imperfect report, was to redeem. The land was sold for taxes, and the mortgagee, as I gather, purchased from the purchaser at tax sale, and in making the purchase represented that he had an interest in the land, and used the word "redemption" in speaking of his purchase.

The present learned Chancellor says, at p. 30: "In truth he had an interest—he was mortgagee, and assuming that he might as mortgagee purchase the land and stand upon his right as purchaser, and not submit to be redeemed, still can it lie in his mouth having made this representation to repudiate the character in which alone, consistently with the truth, he could have asserted that he was interested in the land? A mortgagee may purchase as any stranger may; and may say that his being a mortgagee shall not place him in a worse position than he would be in if he were not a mortgagee, because he is not a trustee for and owes no duty to the mortgagor; but if he purchases as mortgagee, makes his interest in the land a ground for being allowed to purchase, can he afterwards



set up his right to hold, as if he had purchased as a stranger? \* \* \* If the plaintiff had filed his bill for redemption only, I do not see that the defendants could not set up that he had no title to redeem, inasmuch as a sale for taxes had divested him of his estate. It would be proper for him first, I apprehend, to place himself in a position to redeem by getting the estate revested in him."

Now, if the defendants there had claimed their money from the mortgagor, at the same time asserting that by the tax sale and their voluntary purchase under it they had become owners by title paramount, and that the mortgagor's right to redeem was wholly gone, could they have succeeded?

In *Lockhart v. Hardy*, 9 Beav. 349, 357, the Master of the Rolls says: "In equity, the mortgagee is bound to restore the estate on full payment of the debt; and that having sold the estate, and thereby disabled himself from restoring it, he is not in a condition to demand payment of the whole debt, which he does, when he sues on the bond." He then speaks of suing for the difference between the price for which he sold the estate and the balance of the mortgage debt unpaid, but he finally decides against the right to do this, and the judgment is cited in 1 *Fisher on Mortgages*, 354, to that effect (see cases there cited). See also *Schoole v. Sall*, 1 Sch. & Lef. 176, before Lord Redesdale.

I have had the advantage of reading in manuscript a judgment of our learned Chancellor in *Munsen v. Hauss* (a), in which he discusses the general law in a redemption suit. Some of the authorities herein cited are referred to. The subject is one with which, as a common law Judge, I am not very familiar. The authorities are not very clear on the point in issue.

On the whole, my conclusion is, that the mortgagee cannot sue for his mortgage money, while in the same breath he asserts that the estate is wholly his own, and that he

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(a) Since reported, 22 Grant 279.

holds it by title paramount, and wholly independent of any title derived from the mortgagor.

I must be understood as adjudicating on the rights of the parties solely as they appear on these pleadings, viz., that the vessel, in possession of either mortgagor or mortgagee, was sold by a proceeding *in rem* for wages due to the men—that it does not appear by whose default this occurred—that the mortgagee voluntarily attended and purchased the vessel—that he does not aver that he did so to protect his own interests as mortgagee, but distinctly as a stranger—and that he claims to hold by title paramount without any right in defendants to redeem, and the plaintiff in no way consenting to be redeemed, but insisting to hold the mortgaged property as his own.

This, in my opinion, he cannot do, and at the same time enforce payment of the mortgage money.

Had he offered to be redeemed, or to reconvey any interest remaining in him, or made out a case shewing that he purchased merely to save his rights as mortgagee, or claiming to add the purchase money to the original mortgage money, I could understand his right to collect the amount due on the covenant at law.

I invite attention to the argument of counsel in *Perry v. Barker*, 8 Ves. 627; S. C. 13 Ves. 198, and Lord Eldon's general remarks. He says, after foreclosure the mortgagee may still sue, but he shall give the mortgagor an opportunity to redeem; and adds, p. 204: "The true equity and justice of the case seems to be, that the foreclosure is opened by the action; but there must be some mode of bringing forward the mortgagor; or giving him notice that he may redeem; or the mortgagee previously acknowledging, that he is a trustee." I also refer to Lord Erskine's remarks.

I have merely to add, that I apply the general law of mortgage to this mortgage of a mere personal chattel, viz., a vessel, not shewn to come under the Ship Registry Acts.

The act of the plaintiff in purchasing appears to be purely voluntary on his part. It may be urged that if he had not purchased, any other person could have done so, and it

would make no difference to the defendants. I think he could purchase, and could insist on holding by the title so acquired, and successfully resist redemption. But I think he also dissolves all connection, as it were, with the mortgagors—their right to redeem and his to claim payment are equally at an end.

A strong analogy may be observed in our legislation. The estate remaining in the mortgagor may be sold by the sheriff at the suit of an outside creditor or of the mortgagee. The latter may buy or not, as he may please; but if he do buy, he must release the mortgage debt.

I also refer to *Gowland v. Garbutt*, 13 Grant 578, and to *Palmer v. Hendrie*, 27 Beav. 348, 28 Beav. 341.

Judgment for defendants. I think either party may be allowed to amend on the usual terms.

*Judgment for defendants.*

IN THE MATTER OF A PLAINT IN THE FIRST DIVISION  
COURT OF THE COUNTY OF HURON, WHEREIN WILLING  
AND OTHERS ARE PLAINTIFFS, AND ELLIOTT IS DEFENDANT.

*Administration of Justice Act, 1873, secs. 24, et seq.—Application to Division Courts.*

The Administration of Justice Act, 1873, secs. 24 *et seq.*, authorizing the examination of parties to a suit, &c., does not apply to Division Courts.

On the 12th of November, 1875, *Ewart* obtained from Hagarty, C. J. C. P., a rule *nisi* for the defendant, calling on Mr. Toms, the Junior Judge of the County Court of the County of Huron, to shew cause why a writ of prohibition should not issue to him, restraining him from taking any further proceeding under or by virtue of a certain order made by him in the said action, bearing date the 1st of November instant.

The order referred to is, that the defendant do appear before the clerk of the said Division Court at Goderich, at such time and place as he may by writing endorsed on the

order appoint, and submit to be examined *viva voce* upon oath, touching his knowledge of the matters in question in this action, in pursuance of the statute.

Upon this order, the clerk of the Court made an appointment for the defendant to appear before him on the 9th of November, at 10 o'clock in the forenoon, at his office. And at the same time the plaintiffs' attorney gave notice to the defendant to produce upon his examination all documents, letters, deeds, books, papers, and writings whatsoever, then in his possession, power, or under his control, containing any entry, memorandum, or minute, or other matter in any-wise relating to the matters in question in the cause.

It was sworn that the presiding Judge of the said Court had refused to grant a summons to the defendant, calling on the plaintiff to shew cause why the said order should not be set aside as beyond the jurisdiction of the Judge to make the same.

*Ewart* moved the rule absolute, no one appeared to shew cause.

December 7, 1875. WILSON, J.—The Administration of Justice Act, 1873, sec. 24, provides that "Any party to an action at law, after such action is at issue, may obtain a order for the oral examination, upon oath, before a Judge or any other person specially named by the Court, or a Judge, of any party adverse in point of interest, or in case of a body corporate, of any of the officers of the body corporate, touching the matters in question in the action."

Section 25 provides for the production at such examination of all books and papers which the party would be bound to produce on a trial.

Section 27 provides for the original depositions being returned and kept in like manner, as depositions are directed to be returned and kept by the C. L. P. Act, section 193.

Section 28 provides for the sheriff or gaoler taking any prisoner for such examination before the examiner.

Section 30 provides for parties being punished for con-



tempt for non-attendance, refusal to be sworn, or to answer lawful questions. And it also enables the person examined to demur or object to any question, in which case the demurrer or objection shall be taken down by the examiner, and transmitted by him to the office of the Court, and the validity of the same shall be decided by the Court or a Judge, and the costs of, and occasioned by the same, shall be in the discretion of the Court or a Judge.

The 193rd section of the C. L. P. Act refers exclusively to the Superior Courts of Common Law and to County Courts.

The perusal of these enactments will shew that it could not have been contemplated to give the Division Court so very great a power to examine persons situate in other parts of the Province it may be, than in the County which such Division Court is established.

The action there is not one which is spoken of as one in which it is at issue; nor can the deposition taken be transmitted to the office required by the C. L. P. Act. Nor can it be supposed the Judge was to entertain in so formal and expensive a manner demurrers and objections to evidence nor that he should direct sheriffs or gaolers throughout the province to convey their prisoners to the place of examination.

The whole of these provisions are above the subjects of the jurisdiction of these Courts. And if such a practice of the interlocutory examinations of parties were to prevail there, a practice which would be adopted, and perhaps improperly in very many cases the expense to suitors in these Courts for small claims, and reasonably small costs would become intolerable.

I shall certainly not sanction a practice being introduced into these Courts in which the Judge decides according to equity and good conscience so unsuited to their constitution and purpose, without direct legislative authority. It is a practice in the higher Courts in which it prevails, against which fault has been found because of its being adopted in nearly every case as an ordinary item of procedure and of profit.

The order will go for the prohibition.

*Rule absolute.*

MICHAELMAS TERM, 39 VICTORIA, 1875.

(November 15th to December 4th.)

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*Present :*

THE HON. ROBERT ALEXANDER HARRISON, C.J.

“ JOSEPH CURRAN MORRISON, J.

“ ADAM WILSON, J.

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On the meeting of the Court on the first day of term the Honourable JOHN HILLYARD CAMERON, Q.C., on behalf of the Bar, congratulated His Lordship, the Chief Justice of Ontario, upon his elevation to the Bench, to which address His Lordship replied in suitable terms.

## EDWARD AND CHARLES GURNEY V. ÆNEAS D. MACKAY.

*Carriage by water—Vessel burnt in canal—Right to salvage and general average.*

The plaintiffs in October, 1873, shipped 92 tons of pig iron on the defendant's vessel at Montreal, to be carried to Hamilton. She accidentally caught fire in the canal on her voyage, and was destroyed, and the iron sank. The vessel was insured, but not the cargo, and the Inspector of the Insurance Company, after consultation with the captain, made a contract for raising the hull, machinery, and cargo. The iron was piled up at the lock ready for shipping in the Spring, and was then sent on, but defendant claimed a lien upon it for a portion of the expenses incurred in raising the hull and engine.

*Held*, that there was no such lien : that the services rendered could not be considered as in the nature of salvage services, or general average, the iron not being in danger of destruction or loss ; and that the matter could not be considered as the plaintiffs' agents to make the contract, for there was no difficulty in communicating with the plaintiffs and getting their instructions, and such implied agency only arises in case of necessity.

REPLEVIN. Declaration : that the defendant detained from the plaintiffs 92 tons and 248 lbs. weight of No. 1 pig iron, and kept the same so detained until the same were replevied to the plaintiffs ; claiming special damage to the plaintiffs in their business of iron founders.

Pleas. 1. *Non detinet*.

2. That the goods in the declaration mentioned were delivered by the plaintiffs to George Edward Jaques, the elder, and George Edward Jaques, the younger, of the city of Montreal, to be by them carried for the plaintiffs, from the city of Montreal to the city of Hamilton upon a certain vessel of the said Messrs. Jaques, to wit, the propeller St. Lawrence, for certain hire and reward in that behalf, subject to the dangers of fire and navigation ; and that the said vessel on which the said goods were being carried was partly destroyed by fire, and sunk by the dangers of navigation, at the Matilda Canal, between the city of Montreal and the city of Hamilton, and the goods of the plaintiffs were sunk in and upon the said vessel on the occasion aforesaid ; and the same goods were afterwards, by the said Messrs. Jaques, at great expense, raised from the said vessel, and saved from destruction and loss, happening

as aforesaid, and the said goods were afterwards, and as soon as they reasonably could be forwarded by the said Messrs. Jaques, to the City of Hamilton, and delivered to the defendant, as their servant and agent subject to such necessary and proper charges as were necessarily incurred by them in saving the said goods from destruction as aforesaid, and in delivering the same at the city of Hamilton aforesaid, ready to be delivered to the plaintiffs on payment of all said charges to them or to the defendant, as the said servant or agent, of all which the plaintiffs had due notice, but refused to pay the same; and the said charges being still due and unpaid, the defendant, as such servant and agent of the said Messrs. Jaques, and on their behalf detained and still detains the said goods for a lien and security for said charges.

The plaintiffs took issue on the first and second pleas, and replied specially to the second plea, that while the said goods were detained, and before the commencement of this suit, the plaintiffs tendered to the defendant and offered to pay him as such servant and agent as in the plea mentioned, \$461.88 for the necessary and proper charges incurred by the said Messrs. Jaques, in saving said goods and delivering the same at the city of Hamilton, ready to be delivered, &c.; and that the amount of money so tendered was sufficient to fully pay and satisfy all such charges; but the defendant refused to accept the same, and unjustly detained the said goods against sureties and pledges, &c.

Issue.

The case was tried before Strong, J., at the Winter Assizes, 1875, for Hamilton without a jury.

The learned Judge found a verdict for the defendant, reserving leave to plaintiffs to move to enter a verdict for such damages as the Court might think them entitled to, the learned Judge being of opinion that the plaintiffs were not, under any circumstances, entitled to more than nominal damages.

It appeared that on the 17th October, 1873, the plain-



tiffs bought of Leitch, Maclean & Co., of Montreal, 196 tons and 155 lbs. of No. 1 pig iron at \$34.50 per ton, amounting to \$6,764.39 f. o. b., terms six months.

The whole of the iron was in the same fall shipped by Leitch, Maclean & Co., by what was known in Montreal as the Jaques line—100 tons of it being shipped by the Indian; 92 tons 1040 lbs. by the St. Lawrence, and 3 tons 1355 lbs to follow.

The shipping bill was in the following form:—

“Shipped in good order and condition, by Leitch, Maclean & Co., of Montreal, and consigned to E. & C. Gurney, Hamilton, in and upon the steamboat———whereof —— is master for this present voyage, and now lying at the port of Montreal, viz.: 196 tons and 158 lbs. of pig iron, No. 1. Shipped per Indian, 100 tons; shipped per St. Lawrence, 92 tons 1040 lbs.; to follow, 3 tons 1335 lbs., making 196 tons 155 lbs., being marked and numbered as per margin, and are to be delivered in like good order and condition at the aforesaid port of Hamilton, (the act of God, the Queen's enemies, fire, and all and every, the dangers and accidents of the seas, rivers, and navigation, of whatsoever nature and kind, excepted), he or they paying freight for the said goods at \$1.75 per ton of 2240 lbs.

“In witness whereof the master or purser of the said vessel hath affirmed to three bills of lading, all of this tenor and date, one of which being accomplished the rest to stand void.

“Dated at Montreal this 18th day of October, 1873.

“For Master.

“G. E. JAUQUES, Jr.”

Leitch, Maclean & Co., on 20th October, 1873, wrote to the plaintiffs enclosing invoice and shipping bill.

The propeller St. Lawrence, with 92 tons 1040 lbs. of the iron, was accidentally destroyed by fire in the canal, near Edwardsburg, in the county of Grenville, *en route* from Montreal to Hamilton, and on the same day Leitch, Maclean & Co., telegraphed and wrote to the plaintiffs to that effect.

It appeared from the evidence of the engineer and others that she was burnt on the day after she left Montreal, her cargo consisting of the iron, copper tubes, zinc, and some glass, and that she was burnt to the water's edge. The zinc and glass were wholly destroyed, but the remaining cargo sank, and the iron was not in other respects injured.

The vessel was insured, but not the cargo. The insurance was for three-fourths the value of the vessel.

The contract for raising the hull, machinery, and cargo was let by the inspector of the insurance company, after consultation with the captain of the vessel, but without any express assent of the plaintiffs, to one Rose for \$400. The contract was made in the joint interest of the owners of the hull, machinery, and cargo.

The water was turned into the canal. There was eight or ten feet of water in the canal when full, and about eighteen inches when the water was let down. The men, when working to raise the wreck, had to go into the water. They were engaged two or three weeks at the job. The boiler and engine were got out last. The hull was left lying on the canal bank.

The amount disbursed by the owners altogether was \$1,079.16 for services for salvage of cargo and machinery. The pig iron was brought down and piled up at the lock so as to be ready for shipping in the spring. It was afterwards taken to an enclosed yard for safety during the winter. The hull was valued at \$600 for purposes of adjustment. The canal officers would not have allowed the iron to remain in the canal all the winter. It was impeding the navigation and had to be removed. The wreck was left there till spring and then removed. The owners endeavoured to get a vessel to take up the iron to Hamilton before the close of navigation, but did not succeed.

The plaintiffs having on the 20th October, 1873, learnt of the loss of the propeller, by letter of that date, wrote to G. E. Jaques & Co., for information as to the particulars and the prospects of the recovery of the iron, and whether it was

necessary for them, the plaintiffs, to take any steps in the matter.

On 24th October, 1873, G. E. Jaques & Co., in answer wrote to the plaintiffs, that the inspector of the Western Insurance Company had proceeded to the wreck, and, in company with Mr. Jaques, gave out a contract to raise the pig iron and machinery for \$400, and to place it on the canal bank, this amount to be borne *pro rata* by the different interests according to the value of what should be raised, and that as soon as all the expenses were ascertained the separate amounts would be apportioned by the average adjuster, promising to send a letter for their signature as soon as the adjuster could get the necessary papers to enable him to draw it up.

Shortly afterwards an average bond was forwarded for the plaintiffs' signatures, but they refused to sign it.

On 18th November, 1873, G. E. Jaques & Co., wrote to the plaintiffs, regretting to report their inability to send forward the iron, stating that it was on the bank of the Edwardsburg canal, nearly one mile west of lock No. 26 : that all diligence was used to induce craft to call for it, but unsuccessfully : that to leave it where it was would be to have it stolen ; and suggesting that the best thing to do under the circumstances would be to have it removed to a place of safety, at or near the lock, where it could be the more readily shipped ; that the canal was then closed, and that unless there were instructions to the contrary the iron would be removed to the lock.

On 21st November, 1873, the plaintiffs telegraphed Jaques & Co., that they were in want of the iron and must have it immediately delivered, for which they held them (Jaques & Co.,) responsible.

On the same day Jaques & Co. wrote to the plaintiffs stating that the burning of the boat prevented the delivery, and that the clauses of the bill of lading completely, as well as custom, relieved them from further responsibility ; also stating to the plaintiffs that if they wished to take delivery then they could have it, otherwise the

iron would have to be stored till spring, and further stating to the plaintiffs that their proportion would be about \$500, and asking for permission to draw for \$400 on account.

On 29th November, 1873, the plaintiffs wrote to Jaques & Co., stating that they had referred the matter to their solicitors, and were informed by them that this was not a case of general average, and asking them (Jaques & Co.,) to state fully the grounds upon which the claim was made, and in the meantime declining to accept any draft.

On 3rd December, 1873, Jaques & Co., wrote to the plaintiffs, stating they noted the exception taken to the term "general average;" that the term was used as being more generally understood as applied to marine disaster than the word "salvage;" and that the papers had been handed Mr. Cooper to make the adjustment, and apportion the disbursements according to the usage and practice in such cases.

On 30th December, 1873, Jaques & Co. enclosed to the plaintiffs a copy of the adjuster's certificate, shewing the charges on the pig iron to be \$544.18, and stating that in a few days they would draw for the amount.

On 20th January, 1874, Jaques & Co., drew on the plaintiffs for the amount at ten days, and by letter of the same day advised them of the draft.

On 28th January, 1874, the plaintiffs wrote to Jaques & Co., stating that on that day the draft had been presented for acceptance, and acceptance was refused on the ground that they were not liable to pay anything either as salvage or general average, but without prejudice offering to pay the cost of raising the pig iron from the wreck, and carting it to a place of safety, and the expense of watching it and storing it where deposited for safe keeping, in all, as they made it, about \$100, but if not enough to send the items and they would consider them in a liberal spirit.

On 14th February, 1874, Messrs. Martin & Carscallan, acting as solicitors for the plaintiffs, wrote to Jaques & Co. to know, as the season of navigation was fast approaching if they intended to carry and deliver the iron on the contract made last year for the carriage of the same.



On 18th February, 1874, Jaques & Co. wrote in answer that they had been obliged in the interest of the owners to remove the iron from the side of the lock, where it was placed for shipment, to a place of safety for the winter, causing some further outlay than named in the average statement of Mr. Cooper, and stating that if delivery were required it could be had on payment of the amount stated in Mr. Cooper's adjustment, and the amount then referred to in addition, and also stating that the other parties interested in the adjustment both as to cargo and vessel had paid in full without questioning its correctness.

On 20th April, 1874, Martin & Carscallan wrote to Jaques & Co., suggesting to them to deliver the iron to the plaintiffs as soon as navigation should open, without prejudice to their rights, if any, against them, in respect of the disputed items, and recommending them to bring an action for whatever they considered themselves entitled to as against the plaintiffs.

On 24th April, 1874, Jaques & Co. replied to Martin & Carscallan, apparently acquiescing in their suggestion and mentioning some additional charges, but insisting upon their lien after the arrival.

On 25th April, 1874, Martin & Carscallan wrote to Jaques & Co., asking them under the circumstances to waive the lien and bring an action.

On 20th April, 1874, William Zealand, owner of the propeller Calabria, wrote to the plaintiffs, offering to take the iron from the lock where it was to Hamilton, at \$1.50 per ton, free of canal tolls ; and in answer Martin & Carscallan wrote him, referring him to Jaques & Co., and mentioning that the iron was still held by them.

The owner of the Calabria thereupon saw Jaques & Co., and arranged with them for the carriage of the iron to Hamilton.

On 1st May, 1874, Jaques & Co. wrote to the defendant, stating that the Calabria was to call at the canal for the iron ; that the weight when shipped was 92 tons, 1,040 pounds, but having been sunk in the water and

got up as best it could, carted to the lock from the wreck, thence to the yard for the winter, and back again to the lock for shipment, it was not likely to stand its first shipping weight; also stating that the iron was shipped to their own order to secure their lien on it to cover charges which they had paid in good faith.

The following was the demand made on the iron shewing the lien claimed in respect of charges paid:—

December, 1873, To salvage on pig iron on Propeller St. Lawrence as per adjuster's certificate	\$544 18
Protest on draft made for the same.....	1 12
February, 14th, 1874, paid C. Farley for cartage from canal lock to yard and storage for winter.	24 50
May 1st, 1874, paid Armstrong cartage from yard to canal lock .....	20 00
Paid premium on Marine Insurance from Edwardsburg to Hamilton per Calabria on \$600	2 52
C. Arthur Jaques, expenses from Montreal to Edwardsburg and back to arrange for winterage of iron, and again for cartage from yard to lock, say two trips.....	15 00
Sundry telegrams and postage about iron.....	1 50
	<hr/>
	\$608 82

The Calabria about 6th May, 1874, arrived in Hamilton having the iron on board, and the defendant then wrote to the plaintiffs demanding payment of \$854.89, and stating that upon payment of that sum the iron would be delivered.

The \$854.89 was made up as follows:—

Shipper's charges .....	\$608 82
Freight due Calabria 92 tons, 1,040 pounds, wreck of St. Lawrence to Hamilton at \$1.50 per ton.....	138 75
Canal tolls.....	23 00
Tolls on one section by Calabria.....	3 38
McKay's charges.....	80 94
	<hr/>
Total.....	\$854 89

The plaintiffs tendered \$300 and the freight under the original bill of lading, amounting to \$1.75 a ton, making \$461.88. There was no dispute as to the defendants' own charges amounting to \$80.94. These were subsequently paid.

Defendant refused to deliver unless paid \$773.93 in addition to his own charges, and the iron was thereupon replevied by the plaintiffs.

There was evidence on the part of the defence at the trial to shew that \$1,079 was a reasonable amount for the alleged salvage of the wreck and cargo.

There was evidence on the part of the plaintiffs to shew that the charges were excessive.

Counsel for the defendant, relying on *Rogers v. Hooker*, 15 U. C. R. 63, and *Kemp v. Halliday*, 6 B. & S. 723, submitted that the defendant was entitled to a lien for the amount claimed, and that even if excessive there was no tender other than a conditional one of any other amount.

Counsel for the plaintiffs submitted that the case was not one in which any claim could be made for salvage or general average.

The learned Judge inclined in favour of the contention of the defendant, and found a verdict for the defendant.

As to the tender, he inclined to think that the objection that it was a tender made on condition of defendant recognizing the first bill of lading was good, and that the tender was bad.

The evidence, by consent, was taken without any reference as to the amount, if any, to which defendant's principals were entitled, it being understood that if the Court should think defendant entitled to a lien, and that the tender was good, so that the amount should become material, the question of amount should be referred.

Leave was reserved to plaintiffs to move to enter a verdict for such damages as the Court might think them entitled to, the learned Judge, however, being of opinion that if entitled to recover they were only entitled to nominal damages.

In Hilary Term, February 4, 1875, *Richard Martin* obtained a rule *nisi*, calling on the defendant to shew cause why the verdict should not be set aside, and a verdict for the plaintiffs entered instead thereof, pursuant to leave reserved at the trial and to the statute in that behalf; or why a new trial should not be had between the parties, upon the ground that the verdict for the defendant is contrary to law and evidence, according to which the verdict should have been for the plaintiffs, and for the misdirection of the learned Judge in ruling that the plaintiffs' iron was under the circumstances, proved by the evidence, subject to the maritime lien claimed by the defendant, and that the tender of the plaintiffs in that behalf was a conditional tender and therefore of no effect even if sufficient in amount.

In this term, November 26, 1875, *Edward Martin* shewed cause. The vessel having been burnt to the water's edge the clause of the bill of lading as to fire came into force; and thereafter there was no obligation on the shipowner to carry the goods forward: *Rosetto v. Gurney*, 11 C. B. 176; *Farnworth v. Hyde*, L. R. 2 C. P. 204; *Rogers v. Hooker*, 15 U. C. R. 63; *Abbott on Shipping*, 11th ed., 558. It was open to the master of the vessel to raise her either as a joint operation or a separate operation; and the evidence shews the joint operation to have been the cheaper of the two: *Rogers v. Hooker*, 15 U. C. R. 63. All that was charged was the proper proportion. The iron, under the circumstances, was at all events subject to some charge. It was immaterial whether the loss was in a canal or on the lake: *Lowndes on General Average*, 2nd ed. 86. Extraordinary expenditure is equivalent to voluntary sacrifice; it is immaterial whether the claim be presented as one of general average or of salvage, in either view there is a lien: *Abbott on Shipping*, 11th ed. 634; *Kemp v. Halliday*, 6 B. & S. 723, 755. There may be a total loss although the thing be in specie, if the expense of recovery be greater than the value of the article. The plaintiffs being aware of what was being done, and not objecting, cannot now be allowed



to object: *Gaudet v. Brown*, L. R. 5 P. C. 134, 165; *Notara v. Henderson*, L. R. 7 Q. B. 225; *Great Northern R. W. Co. v. Swaffield*, L. R. 9 Ex. 132, 138. The defendant had under any circumstances a lien as a wharfinger: *Boyd v. Maitland*, 16 U. C. R. 311. The whole dispute between the parties was as to the obligation to forward under the original bill of lading. The defendant was not bound to accept any tender which would involve the setting up of the original contract: *McBride v. Bailey*, 6 C. P. 523; *Finch v. Miller*, 5 C. B. 428; *Marquis of Hastings v. Thorley*, 8 C & P. 573. Of the amount tendered, \$461.88, \$161.88, was for the freight under the old contract, and if there was any lien so as to make the amount material, there was no sufficient tender.

*McMichael*, Q. C., and *Richard Martin*, contra. Salvage is only a branch of the law of general average. There must, to entitle a person to salvage, be a common jeopardy and a common loss, a sacrifice of a portion of the property to save the remainder: *The Anne*, 5 Adm. 100; *The Sawney*, 4 Adm. 423. Unless there be immediate and urgent necessity, the master cannot deal for the owner of the cargo, there can be no salvage unless the circumstances show that average is claimable. There was no necessity shewn for raising the vessel except for the purposes of navigation; the hull was only raised for the purpose of saving the machinery, and an effort is being made to charge the cargo for the raising the hull and machinery; *Rex. v. Watts*, 2 Esp. 675; *White v. Crisp*, 10 Ex. 312. No express request on the part of the owner was shewn, and no facts from which the law would infer a request. No claim was made by defendant to hold for wharfage; there was no dispute about his right to wharfage, and he was subsequently paid his wharfage; the plea does not make any claim to hold for wharfage. The contract was not to forward by any particular vessel. If by reason of fire it became impossible for Jaques & Co. to forward by the particular vessel it was their duty to forward by some other

vessel. The carriage therefore was under the original contract, and not under any new contract. The actual expense of raising the cargo was very small compared with the cost of raising the hull and machinery, and yet the cargo is made to bear a very large proportion of the cost. There was no necessity for the service and no foundation for it. The vessel was removed because it interfered with the navigation. The iron was safe where it was, and ought not, without an express request, to have been removed so as to charge the owner with any portion of the cost. If there was any lien the tender was, under the circumstances, sufficient; the tender was not conditional, if \$461.88 was enough it was free of any condition. There is a difference between tender in maritime cases and tender in cases between landlord and tenant. The amount tendered was not refused because of any condition, but because of alleged insufficiency in amount: *Llado v. Morgan*, 23 C. P. 517.

The following cases were referred to as supporting generally the undermentioned propositions:—

There is no salvage or lien such as pleaded: *Nicholson v. Chapman*, 2 H. Bl. 254; *Palmer v. Rouse*, 3 H. & N. 505; *The Vrede*, 30 L. J., Prob. Mat. & Ad., 209; *Nelson v. The Association for the Protection of Commercial Interests*, &c., 43 L. J. C. P. 218; *Duranty v. Hart*, 33 L. J., Prob. Mat. & Ad., 116, 119; *Matthews v. Gibbs*, 30 L. J. Q. B. 55, 62; *Mavro v. The Ocean Marine Insurance Co.*, L. R. 10 C. P. 414, 417, 418; *Sutton v. Buck*, 2 Taunt. 302; *Taylor v. Curtis*, 6 Taunt. 608, 645; *Cox v. May*, 4 M. & Sel. 152, 159; *Castellain v. Thompson*, 13 C. B. N. S., 105; *Cullen v. Butler*, 5 M. & Sel. 461; *Job v. Langton*, 6 E. & B. 779, 793; *Wilson v. Bank of Victoria*, 36 L. J. Q. B. 89, 8 B. & S. 290; *Kemp v. Halliday*, 34 L. J. Q. B. 233, 236, 237, 243; *Hallett v. Wigram*, 9 C. B. 580, 600, 608; *Hearle v. Ross et. al.*, 15 U. C. R. 259; *The Æolus*, 42 L. J. Adm. 14, L. R. 4 Ad. & Ec. 29; *The Charlotte*, 12 Jur. 567, 568; *The Genessee*, 12 Jur. 401.

If the lien pleaded ever existed the tender was, under

the circumstances, sufficient, and defendant's refusal to deliver except on payment of all he claimed made all other tender unnecessary. *The Norway*, 3 Moo. P. C. N. S. 245; *Jones v. Tarleton*, 9 M. & W. 675; *Richardson v. Jackson*, 8 M. & W. 298; *Bowen v. Owen*, 11 Q. B. 130; *Henwood v. Oliver*, 1 Q. B. 409; *Bull v. Parker*, 2 Dowl. N. S. 345; *Scott v. The Uxbridge & Rickmansworth R. W. Co.*, 35 L. J. C. P. 293, L. R., 1 C. P. 596.

December 23. HARRISON, C. J.—The first question which arises is, whether at the time of the alleged refusal the defendant had a right to detain the iron against the plaintiffs. The decision of this question must depend on the fact whether or not, as in *Wakefield v. Brown*, 43 L. J. C. P. 222, at the time of the refusal the defendant or his principals was or were in the condition of a person or persons having a lien on the goods.

The doctrine of lien originated in certain principles of the common law by which a party who was compelled to receive the goods of another was entitled to retain them for his indemnity. Thus carriers and innkeepers had by the common law a lien on the goods entrusted to their charge: *Skinner v. Upshaw*, *Ld. Raym.* 752; *Smith v. Dearlove*, 6 C. B. 132; *Turrill v. Crawley*, 13 Q. B. 197. The rescuer of goods from perils of the sea has, on grounds of public policy, a lien at common law for salvage: *Hartfort v. Jones*, 1 *Ld. Raym.* 393; *The Nicholai Heinrich*, 17 *Jur.* 329; *Baker v. Hoag*, 3 *Barb.* 203. And it is a principle that when a person has bestowed labour and skill in the alteration and improvement of the properties of the subject delivered to him, he has a lien on it for his charge; *Ex parte Ockenden*, 1 *Atk.* 235; *Franklin v. Hesier*, 4 *B. & Ald.* 361; *Ex parte Bland*, 2 *Rose* 91. See also *Johnson v. Crew*, 5 *O. S.* 200; *Dempsey v. Carson*, 11 *C. P.* 462; *Somes v. The Directors of the British Empire Shipping Co.*, 8 *H. L. C.* 338; *Scarfe v. Morgan*, 4 *M. & W.* 270; *Forth v. Simpson*, 13 *Q. B.* 680; *Allen v. Smith*, 12 *C. B. N. S.* 638. But here the rule appears to stop, and not to

include cases wherein expense has been bestowed upon the object claimed to be retained without producing any alteration in it: *Stone v. Dingwood*, 1 Str. 651; *Jackson v. Cummins*, 5 M. & W. 342; *Nicolls v. Duncan*, 11 U. C. R. 332. See further 3 *Parsons on Contracts*, 5th ed., 234, *et seq.*

It is not claimed by the defendant that there was any express promise to pay for the disputed services, or any agreement for a lien till payment; but it is contended on the facts shewn that the law infers the promise, and gives the right of lien—the service having been one in the nature of salvage, or for which a claim may be made as on a general average. No man has, as a rule, the right to force services on another, and by detention of goods or otherwise compel that other to pay for them. One well recognized exception is maritime salvage; another is general average. Principles of public policy and commercial necessity support these exceptions. See *Nicholson v. Chapman*, 2 H. Bl. 254; *Palmer v. Rouse*, 3 H. & N. 505.

If the property of an individual on land be exposed to the greatest peril, and be saved by the voluntary exertions of any person whatever: if valuable goods be rescued from a house in flames, at the imminent hazard of life by the salvor, no remuneration in the shape of salvage is allowed. The act is highly meritorious, and the service is as great as if rendered at sea. Yet the claim for salvage could not, perhaps, be supported. It is certainly not made. Let precisely the same service, at precisely the same hazard, be rendered at sea, and a very ample reward will be bestowed in Courts of Justice. If we search for the motives producing this apparent prodigality in rewarding services rendered at sea, we shall find them in a liberal and enlarged policy. The allowance of a very ample compensation for those services, (one very much exceeding the mere risk encountered, and labour employed in effecting them), is intended as an inducement to render them, which it is for the public interests, and the general interests of humanity to hold forth to those who navigate the ocean:



per Marshall, C. J., in *Mason v. The Blaireau*, 2 Cranch, p. 186.

Now, for the present, conceding that services performed in one of the canals of the river St. Lawrence are to have the same weight and to be followed by the same consequences as to the rights and liabilities of the parties and their property as if rendered at sea, I shall proceed to enquire whether according to the principles of maritime law the services relied on here can be claimed as salvage services.

The grounds on which salvage services rest are a marine peril, voluntary service, and success: see *Abbott on Shipping*, 11th ed. 523; *Jones on Salvage* 2; *Lowndes on General Average*, 2nd ed., 86; 2 *Parsons on Contracts*, 5th ed., 315; *Maclachlan on Shipping*, 2 ed. (1875) 579.

In this case there was voluntary service and success, but the enquiry remains whether there was marine peril. It is an absolute pre-requisite that the cargo should at the time of the service be actually or prospectively in danger of destruction.

The degree of danger is immaterial, in considering the nature of the service, for if the cargo at all required assistance to remove it to a place of safety, the service then assumes the character of a salvage service: *The Westminster*, 1 W. Rob. 229, 232.

All services rendered at sea to a vessel in danger or distress are salvage services. It is not necessary \* \* that the distress should be actual or immediate, or that the danger should be imminent and absolute; it will be sufficient if, at the time the assistance is rendered, the vessel has encountered any damage or misfortune which might possibly expose her to destruction if the services were not rendered: per Dr. Lushington in *The Charlotte*, 3 W. Rob. 69, 71. See also *The Mary*, 1 W. Rob. 448; *The Upnor*, 2 Hagg. Ad. 3; *The Persia*, 1 Spinks 166; *The Traveller*, 3 Hagg. Ad. 371; *The Giacomo*, Ibid 344; *The Anastasia*, 1 Bened. Ad. 166, mentioned in a note b. to *Jones on Salvage* 2.

The degree of peril from which a vessel is rescued is shewn less by the opinion of witnesses, whose judg-

ments are often warped by interest, or by an *esprit de localité*; than by the facts of the case, such as the vessel's position, the state of the tide, course and strength of the winds, and the knowledge or ignorance of the dangers of the locality on the part of those in charge: *Jones on Salvage* 4.

It is not shewn here by any witness that the vessel took fire on the river, and was for the safety of the cargo driven into the canal as a place for the safety of the cargo; and this I take it is a plain distinction between this case and the case of *Rogers v. Hooker et al.*, 15 U. C. R. 63, relied upon by the defendant's counsel as an authority in his favour. In that case the master swore that the stranding was the "*only resource for preventing a total loss of the cargo.*" He also swore that he thought "the plaintiff's goods must have been lost if they had not been taken out of the steamer."

For all that appears the fire, which was an accidental one, commenced in the canal, and there, against the will of the master and crew, destroyed the vessel; but looking at the character of the cargo (pig iron), and its situation in the canal, I fail to see that it was necessary for the master of the vessel to do anything for the mere purpose of saving it from destruction.

And this is the allegation—a material and necessary allegation—in the plea, viz., "and the said goods were afterwards by the said George Edward Jaques, the elder, and George Edward Jaques, the younger, at great expense raised from the said vessel and saved from destruction and loss happening as aforesaid." This was also the allegation in the fifth plea in *Rogers v. Hooker et al.*, 15 U. C. R. 63.

It does not appear that the pig iron if allowed to remain in the canal would have been either destroyed or lost, and there was no witness who so testified; and for this reason the claim, if any, of the defendant to a lien must, I think, be rested on some other ground than maritime salvage.

Next, is the lien one claimable as a general average?

All loss which arises in consequence of extraordinary

sacrifices made, or expenses incurred, for the preservation of the ship and cargo, comes within general average, and must be borne proportionably by all who are interested : *Lowndes on General Average*, 2nd ed., 1.

By the law of the Rhodian Republic it was laid down that where there was a common adventure of the property of several, if it became necessary in consequence of perils of the sea purposely and intentionally to sacrifice part of the property adventured for the preservation of the rest, the owners of the property preserved should contribute to the loss of the owner of that which was so sacrificed for the common benefit. This law has since been adopted in the code of every civilized country, but unfortunately there has been a difference in different countries as to what ought to be considered a sacrifice for the common benefit, and consequently a general average loss : per Blackburn, J., in *Marro v. Ocean Marine Insurance Co.*, L. R. 10 C. P. 414, at p. 417.

By the law of England, after the cargo is in safety, the benefit it may derive from being carried in the ship to its place of destination is not a ground for making it contribute towards the cost of repairing the ship, nor of placing the ship in a position in which she can be repaired : *Ib.* 4.

It is the primary duty of the master, acting for the owner to do his best to convey the cargo to its place of destination in the same ship, and in case of damage to repair it. \* \* The owner of the goods is under no obligation to contribute to any expenses except such as constitute a general average, and that of repairs does not fall under this description : *Duncan v. Benson*, 1 Ex. 537, per Pollock, C. B., at p. 555.

In *Hallett v. Wigram*, 9 C. B. 502, where the ship "Harpooner" was repaired in a port of refuge at a cost exceeding her value, and it was distinctly alleged in the pleadings that this would not have been done but for the purpose of carrying on the cargo, the claim against the cargo was rejected on, among other grounds, the ground that the cargo was in safety, and might have been forwarded in some other ship.

In giving judgment in the last mentioned case, at p. 601, Wilde, C. J., refers to the fact that the plaintiffs' goods (copper ore) were of a description not to be deteriorated to any great extent, and then proceeds: "The pleas allege that the cargo could not be conveyed to its port of delivery by any other ship; but it appears both from the declaration and the pleas, that the cargo consisted of other goods besides those of the plaintiffs, and there is no allegation that the plaintiffs' goods might not have been forwarded by another ship, or that they were in any immediate peril. This, therefore, is the case of ordinary sea damage, which the owner must repair at his own expense. The claim for general average arises where a part of the shipper's goods is sold or destroyed for the purpose of relieving the rest from some *impending peril*."

The general principle upon which contribution to general average depends is, that there must be in the first place a danger common to both—that is, danger actual or impending—a danger that is common to both subjects which are to be affected by a general contribution. There must be some extraordinary expense or voluntary sacrifice on the part of the owner of one of the subjects which is necessary to avert the common peril; and then all who derive benefit must contribute in their proper proportions: per Bovill, C. J., in *Walthew et al. v. Mavrojaní et al.*, 39 L. J. Ex. 81, 85, L. R. 5 Ex. 116.

I do not see on what principle a lien can be claimed against the cargo in this case, as the subject of general average.

I do not think there was the common peril to make the common contribution reasonable or proper according to the cases. The reasons for holding that the services were not salvage services also shew that there can be no contribution independently of contract in the nature of general average. See *Wilson et al. v. The Bank of Victoria*, 36 L. J. Q. B. 89.

But it is argued that although the claim be not one strictly for salvage or strictly for general average contribution, yet under the circumstances the master of the vessel was the agent of the owner of the cargo, as well



as of the owners of the vessel for the purpose of making any contract necessary for the forwarding of the cargo to its place of destination.

It should be observed that, although in *Rogers v. Hooker et. al.*, 15 U. C. R. 63., as I have already pointed out, there was testimony shewing that the stranding was voluntary for the purpose of saving the cargo. And Mr. Justice Burns rests his judgment, not so much on the question of salvage or of general average as "on the ground of contract made by the defendants or their master as agent of the plaintiff, for his benefit:" *Ib.* p. 81.

The master is bound by his contract to carry the goods to their destination in his own ship. If that ship be disabled in the course of the voyage, and cannot be repaired at all, or cannot be repaired in time to save a perishable cargo, he is empowered, if not bound, to send the cargo on in another bottom, provided it can be obtained: *Per Jervis, C. J.*, in *Rossetto v. Gurney*, 11 C. B. 176 at p. 187.

If the voyage is completed in the original ship, it is completed on the original contract, and no additional freight is incurred. If the master tranships because the original ship is irreparably damaged, without considering whether he is *bound* to tranship, or merely *at liberty* to do so, it is clear that he tranships to earn his full freight; and so the delivery takes place upon the original contract: *Ib.* at p. 188. See also *Shipton v. Thornton*, 9 A. & E. 314; *Farnworth et al. v. Hyde*, L. R. 2 C. P. 204. But a master is not bound to delay his voyage for the sake of the goods; *Steamboat Lynx v. King*, 12 Miss. 272; *Soule v. Rodocanachie*, 1 Newb. Ad. 504, approved in *Notara v. Henderson*, L. R. 7 Q. B. 225.

An examination of the cases will shew that the master is not free from all responsibility as to the cargo, although damaged by one of the casualties mentioned in the bill of lading, and although unable to carry them further because of the loss of his ship, by reason of one of the excepted casualties.

It is now thoroughly settled that the exemption in a bill of lading only exempts the shipper from the absolute

liability of a common carrier, and not from the consequences of want of reasonable skill, diligence, and care, which want is popularly described as "gross negligence." This is settled so far as the repairs of the ship are concerned, by the judgment of Lord Wensleydale in *Worms v. Story*, 11 Ex. 430; as to her navigation by a series of authorities collected in *Grill v. The General Iron Screw Colliery Co.*, L. R. 1 C. P. 600; S. C. L. R. 3 C. P. 476; and as to her management, so far as it affects the care of the cargo itself, in *Laurie v. Douglas*, 15 M. & W. 746, where the Court (in a judgment unfortunately not reported at large) upheld a ruling of Pollock, C. B., that the shipowner was only bound to take the same care of the goods as a person would of his own goods, viz.: 'ordinary and reasonable care.' These authorities and the reasoning on which they are founded are conclusive to shew that the exemption is from liability for loss which could not have been avoided by reasonable care, skill, and diligence, and that it is inapplicable to the case of a loss arising from the want of such care, and the sacrifice of the cargo by reason thereof: Per Willes, J., in *Notara v. Henderson*, L. R. 7 Q. B., at pp. 235, 236.

The freight is not due till carried, but the ship-owner is entitled to retain the goods for the purpose of earning it: per Willes, J., *Ib.* p. 234. See also *Niagara v. Cordes*, 21 How. 7, 28; *King v. Shepherd*, 3 Story 349.

Though in the ordinary state of things he (the master) is a stranger to the cargo, beyond the purposes of safe custody and conveyance, yet in cases of instant and unforeseen and unprovided necessity, the character of agent and supercargo is forced upon him, not by the immediate act and appointment of the owner, but by the general policy of the law; unless the law can be supposed to mean that valuable property in his hand is to be left without protection and care: per Lord Stowell in *The Gratitude*, 3 Adm. Rob. 240, at p. 257.

The master is the agent of the ship-owners; he has charge of the ship for them; he has therefore a much more powerful control over the ship in cases of injury than

he can have over the cargo, because he is altogether entrusted by the ship-owners with the charge of the ship; but with regard to the goods which are shipped on board, it is not so; he is bound to convey them according to the tenor of his bill of lading, or whatever contract he has entered into, to their place of destination; and all the books of authority, English and foreign, say, it is only if an accident arises, if he is actually cast away, that he is to deal with the cargo, it being a necessity cast upon him, not by any act of others with whom he is connected, but by the events that have occurred, and because the cargo is not to be left to perish, or to be left unguarded and uncared for, and there is no one else on whom the duty of guarding the goods, or taking care, or doing the best with them, can be cast except upon the master: per Sir John Patteson in *Tronson v. Dent*, 8 Moo. P. C. 449. See further *Notara et al. v. Henderson*, L. R. 7 Q. B. 225.

In *Rogers v. Hooker et al.* 15 U. C. R. 63, 69, Sir John B. Robinson is reported to have said "It is singular that no case appears to have arisen in England in which the right, under circumstances such as occurred in this case, to charge increased freight to the owners of the cargo saved from the wreck, and forwarded in another ship to the place of destination, has been the point in question. There have been many cases, however, in which the duty of the master under such circumstances to do the best he can for the interest of all concerned has been extensively discussed, chiefly, however, where the master had taken upon himself to sell the goods, either on account of their being damaged, or because he considered that the inevitable delays and difficulties in the way of forwarding the goods to their place of destination justified him in giving up the attempt. Enough, I think, appears in the language of the Court in these cases to justify the conclusion, that whatever responsibility it may become the duty of the master to assume in a case like the present, where in consequence of the total loss of the ship in which the goods were being carried, *her* further prosecution of the voyage had become impossible, he has the privilege of assuming the responsi-

bility of determining whether it is not for the benefit of the owners of the cargo that he shall, if possible, save their goods from the stranded vessel, embark them in another, and so forward them to the place of destination."

But this expression of opinion must be taken as qualified by cases subsequently decided by the Privy Council.

In *Duranty v. Hart*, 2 Moo., P. C. N. S. 289 at p. 321, Lord Kingsdown is reported to have said "The character of agent for the owners \* \* is imposed upon the master by the necessity of the case—and by that alone. In the circumstances supposed something must be done, and there is nobody present who has authority to decide what shall be done. The master is invested by presumption of law with authority to give directions on this ground—that the owners have no means of expressing their wishes. But when such means exist, when communication can be made to the owners, and they can give their own orders, the character of agent is not imposed upon the master, *because the necessity which creates it does not arise.*"

In the *Australian Steam Navigation Co. v. Morse*, L. R. 4 P. C. 222, at p. 234, Sir Montague Smith is reported to have said "There can be no doubt that the master is bound to employ the telegraph as a means of communication where it can be usefully done."

In *Gaudet v. Brown*, L. R. 5 P. C. 134 at p. 165, the same learned Judge is reported to have said: "The authority of the master, being founded on necessity, would not have arisen *if he could have obtained instructions from the defendant or his assignees.* But under the circumstances this was not possible."

In the case now before us there was nothing to prevent the master obtaining instructions from the plaintiffs, and so, in the words of Sir Montague Smith, the authority of the master to bind the owner of the goods by a contract made in reference to them did not arise.

The result of the examination of the authorities is, that there was, in my opinion, no such lien as claimed here. This renders unnecessary the consideration of the question



whether the tender was a proper one. The lien, if any, of the defendant as a wharfinger was not set up as a distinct ground of detention when the goods were claimed, is not the ground of detention alleged in the plea, has been since discharged, and cannot avail the defendant in this action.

I think the verdict must be entered for the plaintiff, but only for nominal damages, twenty cents.

MORRISON, J.—I concur in the conclusion arrived at by the learned Chief Justice. I do not think this is a case to which the principles and rules of general average or salvage can apply.

The iron was lying in the canal. There was no danger that it would be lost or even injured while lying there. No risk was run in removing or saving it. It was a mere inatter of work and labour.

If the plaintiff had been notified by the owners of the burnt vessel or the canal authorities to remove the iron, and that in the event of their not doing so it would be removed at their expense, and the plaintiffs refused to do so, and the iron afterwards was *ex necessitate* removed to the banks of the canal, or to a place for shipment, in all probability the persons so removing it would be entitled to claim a reasonable amount for so doing. But I see no ground for charging these plaintiffs with a portion of the expense of raising the hull and engine of the vessel, or creating any lien for such expenses. Suppose the vessel had taken fire and sank at the wharf at Hamilton, would not the plaintiffs have been entitled to remove their iron free from any charge connected with raising the hull, &c. ? Can there be any difference in that respect if she was burnt in the canal ?

WILSON, J., took no part in the judgment, not having been present at the argument.

*Rule absolute to enter verdict for plaintiff's  
for 20c.*

## PRONGUEY V. GURNEY ET AL.

*Landlord and tenant—Fixtures—Surrender.*

An engine and boiler put into a carpenter's shop and manufactory of agricultural implements: *Held*, to be trade fixtures as between landlord and tenant, and removable by the tenant.

*Held*, also, that neither the increase nor reduction of the rent in this case, under the circumstances stated, operated as a surrender of the term and an acceptance of the new tenancy, so as to prevent the tenants from claiming the fixtures.

This was an action brought to try the right to fixtures as between landlord and tenant.

The first count of the declaration alleged that the defendants being possessed of the east part of lot two on the east side of James street, between Cameron and Gore streets, as described on Mackenzie's map of the city of Hamilton, otherwise known as Gurney's Scale Works, as tenants of the plaintiff, during the tenancy wrongfully committed waste.

The second count was similar except that it alleged the waste to have been committed by defendants after the termination of their tenancy.

The defendants pleaded to the first count a justification to the effect that the alleged waste was in the removal of trade fixtures, and in removing the same, they did necessarily and unavoidably do a little damage.

The only plea to the residue of the declaration was not guilty.

The first plea and all the subsequent pleadings thereto will be found reported at length in 36 U. C. R. 53, where the decision of the Court on the issues in law will be found.

The issues in fact were tried at the Hamilton January Assizes for 1875 before Strong, J., and a jury.

There was a verdict for the plaintiff for \$270, the value of an engine and boiler.

The engine and boiler in respect of which the recovery was had were before the removal by defendants situate on the parcel of land in the declaration mentioned.

On 3rd April, 1849, this parcel of land was demised by

Alexander Carpenter, guardian of the person and estate of George Hallister Hills, an infant, for the term of eleven years from date, at the annual rental of £45. There was no machinery of any kind on the land at the time of the making of this lease. The lessee, who was a builder, about 1850 put in an engine and boiler for the purposes of his business. The engine and boiler were put in for running saws. He also put up a brick engine house for the purpose of covering them. On 17th May, 1851, Albert H. Hills assigned to James L. Willson all his right, title, and interest, in the lease and the premises therein mentioned, together with the machinery and appurtenances thereunto belonging. On 30th June, 1853, James L. Willson assigned to William Adkins, Harman G. Ellsworth, Levi Wells, and George H. Davis, carrying on business under the name of "Adkin, Ellsworth & Co." all his right, title, interest, estate, and term of years yet to come and unexpired in the lands and premises, together with the lease, but without making any express reference to the machinery. On 2nd April, 1856, 16th April, 1856, and 10th May, 1856, Adkins and Ellsworth, two of the last mentioned persons, assigned and further charged the steam engine, boiler, machinery, &c., unto John Riddell and John McNab, to secure the repayment of moneys lent and to be lent, by the mortgagees to the mortgagor. On 23rd May, 1856, Riddell & McNab assigned their interest in the steam engine, boiler, machinery, &c., to Charles Gurney and Alexander Carpenter. On 26th May, 1856, Adkins and Ellsworth executed and delivered to Edward Gurney and Edward W. Ireland, a general assignment of all and singular their estate and effects whatsoever, and wheresoever situate, upon trusts for the payment of creditors. In 1856, the defendants' firm went into possession. The firm then consisted of Edwin Dally, Alexander Carpenter, Elijah W. Ware, Isaac Kelly, Edward Gurney, and Charles Gurney. They went into possession under the lease from Carpenter to Albert Hill, and the several assignments thereof down to Edward Gurney and Edward W. Ireland, and the mortgages from Adkins and

Ellsworth, subsequently assigned to Charles Gurney and Alexander Carpenter. Before defendants went into possession in 1856 the premises had been used as a carpenter shop and manufactory of agricultural implements, and at that time there was a steam engine and boiler on the premises. This is the same engine and boiler that remained on the premises till the removal in October, 1872. It was an engine and boiler, said to have been put up by Adkins and Ellsworth in lieu of the engine and boiler first placed on the premises by Albert H. Hills. Defendants about six months after they got possession made a transfer to Joseph Flint, of Rochester. Flint afterwards made a transfer to Dally, Ware & Co.

The original lease, which was at £45 per annum rent, expired in 1860. Defendants afterwards continued in possession from year to year, from the time the lease expired till within a year of Counsell's purchase hereafter mentioned, at the annual rental of \$400, and then it was reduced to \$300 per annum. The increased rent was paid on the same quarter days as mentioned in the original lease. When the rent was reduced from \$400 defendants gave up possession of part of the premises, consisting of a rough-cast building, to the landlord, then George Hills. There was no other change in the holding. Nothing was at the time said about fixtures. Carpenter, the original lessor, who was afterwards a partner of the defendants, made no claim as landlord to the fixtures. He retired from the concern in 1861, transferring all his rights to the defendants.

On 21st February, 1871, Charles M. Counsell, the plaintiff's vendor, became the owner of the reversion.

On 15th September, 1871, the following memorandum was signed by Counsell and Edward Gurney, in the names of E. & C. Gurney:—"It is understood and agreed between the undersigned, C. M. Counsell and E. & C. Gurney, that the rent of 'The Scale Works' is \$300 a year and taxes, payable quarterly, and that the lease terminates on either party giving six months' notice. C. M. Counsell; E. & C. Gurney."



On 27th April, 1872, Counsell gave defendants six months' notice to terminate the lease, and the defendants undertook to give up possession on 27th October, 1872.

On 19th June, 1872, Counsell conveyed the reversion to the plaintiff. He, for the first time, made a claim to the fixtures, a claim which defendants at once denied. Before the expiration of the lease, and before Carpenter went out of the firm, Dally's interest was transferred to Gurney & Carpenter. The firm of Gurney & Carpenter consisted of Carpenter and E. & C. Gurney. Gurney & Carpenter bought Dally's interest and the firm then became Carpenter, Ware & Co. After Carpenter went out it was Gurney, Ware & Co., and has been so ever since. Kelly & Ware were members of the firm of Gurney, Ware & Co. The firm of E. & C. Gurney was a different firm. Kelly & Gurney had no interest in that firm. The memorandum of 15th September, 1871, was signed by the defendant Edward Gurney, who was a member of both firms. It should have been signed "Gurney, Ware & Co."

The notice to terminate the lease was accepted by Gurney, Ware & Co. Edward Gurney signed it because requested by Counsell to do so, Counsell at the time saying he wanted "to keep all straight."

The examination of the defendant Edward Gurney, disclosing most of the foregoing facts, was at the instance of the plaintiff, under the Administration of Justice Act, put in as evidence by the plaintiff at the trial.

After defendants' counsel had addressed the jury, the plaintiff's counsel took some formal exceptions to the title of the defendants, which are not specifically noted by the learned Judge who tried the cause.

The learned Judge asked the jury to find the value of the engine and boiler, and asked the jury to say whether on the evidence they found the removal to be before or after 27th October, 1872—the termination of the lease.

After the jury retired, counsel for the defendants asked the learned Judge to recall them to direct them that they might presume the non-produced assignments of the term

from Adkins & Ellsworth, down to defendants, which the learned Judge declined to do, stating that he was doubtful if the examination of defendant read by plaintiff did not supply the alleged defect (not stated), which the learned Judge says he considered merely a formal one.

The jury found the value of the engine and boiler to be \$270, and that they were removed before the expiration of the lease.

A verdict was accordingly entered for plaintiff for \$270, with leave reserved to defendants to move to enter the verdict for them.

It appeared that the engine rested on a wooden frame. The wooden frame rested on the ground. Part of the frame was fixed in the ground. There were posts let into the ground. Sills were framed on these posts. The engine was bolted to the frame. The bolts were fastened with nuts. The boiler was imbedded in brick, and could not be removed without disturbing the bricks. The engine and boiler were connected in the ordinary way by the steam pipe. In removing the engine the bolts were unscrewed and the engine lifted off the frame. The building in which the boiler and engine were was just a shell to protect the engine and boiler. The engine and boiler were carefully removed. There was no unnecessary injury done to the premises in the course of the removal. The boiler had been twice removed for the purpose of being repaired, during the interval between defendants going into possession and quitting possession in October, 1872. The end of the brick-work of the boiler was taken out and the boiler was slipped out for repairs. It was taken out finally in 1872, in the same summer. The engine was not enclosed in the brick-work.

During Hilary term last, February 2, 1875, *Richard Martin* obtained a rule *nisi* calling on the plaintiff to shew cause why the verdict obtained in this cause should not be set aside and a verdict for the defendants or a non-suit entered, pursuant to leave reserved, or a new trial had between the parties, because the verdict for the plaintiff is

contrary to law and evidence according to which there should have been a verdict for the defendants—and for misdirection of the learned Judge in directing a verdict for the plaintiff, and in refusing to leave the question to the jury, whether there was not a transfer of the interest of the different lessees and assignees to the defendants, and for refusing to direct the jury that the same might be presumed by the jury from the evidence and in ruling that the acceptance by the landlord of rent from the defendants and those preceding them in occupation of the demised premises, and permitting them to occupy the same in the manner shewn in the evidence, was no evidence of their holding on the same terms as to fixtures as the former lessees, or why the defendants should not be allowed to add an equitable plea setting forth their right to hold the said engine and boiler under the terms of tenancy.

In this term, November 26, 1875, *Duff* shewed cause. There was no sufficient evidence of the assignment from Flint to Dally, Ware & Co., and the transfer, if any was of the lease but not of the fixtures. [He also submitted a number of other objections of a formal and technical character not necessary to be mentioned.] The new arrangement, to pay \$400 a year rent instead of £45 a year as in the lease, operated as a surrender of the old lease, including the fixtures. When the rent was reduced to \$300 per annum, there was a surrender of the old lease, including fixtures. Further, the memorandum between Counsell and defendants operated as a surrender of the old term and the creation of a new demise.

*McMichael*, Q. C., and *Richard Martin* contra. The defendants were sufficiently shewn to be lessees of the term—the plaintiff, and those under whom he claimed, had so treated them. The jury should have been told they might presume title in the defendants; and at all events the examination of the defendant Gurney, used by the plaintiff at the trial as evidence, was sufficient for the purpose. The premises when rented were rented for trade purposes. The engine and boiler were put up by the tenant for

purposes of trade, and were therefore trade fixtures *McLaren v. Coombs*, 16 Grant 587; *Lancaster v. Eve*, 5 Jur. N. S. 683. If no perfect paper title was shewn, still there was sufficient title as against the plaintiff: *Hitchman v. Walton*, 4 M. & W. 409, 414, 415; affirmed in *Brown v. Sage*, 11 Grant 239, 241; *Kelly v. Patterrrson*, L. R. 9 C. P. 681. The tenancy was under the unexpired lease: *Clarke v. Moore*, 1 Jones & L. 723; *Cornell v. Murphy*, 3 U. C. R. 263. There was no giving up of the old lease and taking of a new one, so as to pass the fixtures to the landlord: *Doe Biddulph v. Poole*, 12 Jur. 450; *Doe Monck v. Geekie*, 5 Q. B. 840; *Crowley v. Vitty*, 7 Ex. 319; *Burrowes v. Gradin*, 1 D. & L. 213; *Digby v. Atkinson*, 4 Camp. 275; *Foquet v. Moor*, 7 Ex. 870, 874; *Woodfall's L. & T.*, 10th ed., 179. There are no pleadings which enable the plaintiff to raise any question of title, and the holding throughout was in the terms of the old lease, except as varied by the alteration in the amount of rent: *Doe Linsey v. Edwards*, 5 A. & E. 95, 103; *Doe Wright v. Smith*, 8 A. & E. 255, 259, 260; *Gladman v. Plumer*, 10 Jur. 109; *Williams v. Hayward*, 1 E. & E. 1040, 1050; *Barry v. Goodman*, 2 M. & W. 768; *Donellan v. Read*, 3 B. & Ad. 899, 905; *Meux v. Jacobs*, L. R. 7 H. L. 481.

December 23, 1875. HARRISON, C. J., delivered the judgment of the Court.

The question of fixture does not depend upon whether or not the foundation is let into the soil, but on the nature and character of the act by which the structure is put in place, the policy of the law connected with its transfer, and the intentions of those concerned in the act: *Meigs' Appeal* 1 Am. 372.

The term fixture is an ambiguous one. It has been defined to be such an annexation as can be removed from the land by the party annexing it adversely to the owner, but in its more general sense it means any annexation or addition which has been affixed or planted in the soil of the land. The rule of the law is "*Quicquid plantatur solo*



*solo cedit*: *Broom's Maxims*, p. 295, and in several of the old books the word "*fixatur*" is used as synonymous with "*plantatur*." This rule, however, has been relaxed, and whatever the authority may have been for the relaxation, there now exist a variety of authorities binding upon all Courts prescribing the law as to fixtures between the heir and the executor, between the tenant for life or in tail, and the remainderman or the reversioner, and between landlord and tenant, per Kelly, C. B. in *Climie v. Wood*, L. R. 3 Ex. 257, 260.

*Climie v. Wood* was an action of detinue for a steam engine and boiler. It appeared that the engine was screwed down to some planks which lay on the ground, and the boiler was fixed in brick-work. They were used for sawing timber in the plaintiff's business of a contractor.

In speaking of them, Kelly, C. B., at p. 260, said: "Were this case one between landlord and tenant, there is no doubt whatever but that the tenant could lawfully remove the steam engine and boiler in question."

In speaking of them, Willes, J., in the same case in Error, L. R. 4 Ex. 328, said, at p. 330, "Now, in the present case, we think, upon the evidence and findings of the jury, that the engine and boiler belonged to this last class, (trade fixtures), and if erected by a tenant might have been removed by him during his term." But the case was one between mortgagor and mortgagee, in which a very different rule is applied: See *Walmsley v. Milne*, 7 C. B. N. S. 115; *Cullwick v. Swindell*, L. R. 3 Eq. 249; *Longbottom v. Berry*, L. R. 5 Q. B. 123; *Holland v. Hodgins*, L. R. 7 C. P. 328; *Pater-son v. Pyper*, 20 C. P. 278.

Still a reference to the cases bearing on the point will be found abundantly to sustain the dicta of the learned Judges to which I have above referred. See *Lawton v. Lawton*, 3 Atk. 13; *Lord Dudley v. Lord Ward*, Ambler 113; *Minshall v. Lloyd*, 2 M. & W. 450; *Wansborough v. Maton*, 4 A. & E. 884; *Shinner v. Harman*, 3 Ir. C. L. R. 243; *Hellawell v. Eastwood*, 6 Ex. 295, 312; *Mather v. Fraser*, 2 K. & J. 536; *Gooderham v. Denholm*, 18 U. C. R. 203; *Carscallen*

v. *Moodie*, 15 U. C. R. 304; *Davy v. Lewis*, 18 U. C. R. 21; *Hughes v. Towers*, 16 C. P. 287; and the many cases cited by Chief Justice Richards in *Great Western R. W. Co. v. Bain*, 15 C. P. 207, 218; *Burnside v. Marcus*, 17 C. P. 430; *McLaren v. Coombs*, 16 Grant 587.

We therefore come to the conclusion that the steam engine and boiler in question would be removable as between the original landlord and tenant.

The next inquiry is, as to the right of the assignee of the lessee either of the term without mention of the fixtures or of the fixtures described as chattels.

In the case of a freeholder he has exactly the same interest in every thing attached to the freehold as he has in the bricks and mortar themselves which make up the walls of the freehold. But that is not the case with respect to a tenant who has a limited interest in the soil and buildings—it does not signify what the limited interest is—and who has besides an absolute interest a complete and unqualified property, unqualified except as to this, that he must remove them before the end of his term, in the fixtures as distinct from the land. This interest is a thing which he can part with, a thing which his creditors can seize, and a thing which is liable to execution as against him just as much as the chairs and tables in his house, per L. J. James in *Ex parte Daglish*, L. R. 8 Ch. 1072, 1080.

There is, we think, no doubt that by a conveyance, whether to a purchaser or mortgagee, of the interest of a tenant in land trade fixtures annexed to the land will pass unless there be some words in the deed to exclude them. See *Colegrave v. Dias Santos*, 2 B. & C. 76; *Boydell v. McMichael*, 1 C. M. & R. 177, and the language of Parke, B., in *Hitchman v. Walton*, 4 M. & W. 415; approved in *Brown v. Sage*, 11 Grant 239. See also *Meux v. Jacobs*, L. R. 7 H. L. 481; and in this view the defendants, if the purchasers of Hills, the original lessee, would be entitled to the fixtures; but the enquiry is unnecessary, as they also make title under the specific mortgage of them made by Adkins and Ellsworth.

The plaintiff sues the defendants as tenants. Before action he treated them as tenants. Those under whom he claims continuously treated them as tenants. The defendants claiming to be tenants regularly paid rent. We do not think, under the circumstances, that it is open to the plaintiff on this record to endeavour "to pick holes" in their title; and this more especially as the plaintiff at the trial put in and used as evidence the oral examination of one of the defendants, who without objection of any kind disclosed the title of the defendants to be that not only of the original lessee but of the mortgagees of the fixtures as chattels.

But it is contended by the plaintiff that the fixtures became the property of the landlord at the time the rent was increased from £45 to \$400 per annum, at the time it was reduced to \$300 per annum, or at the time the defendants signed the writing between themselves and Counsell, on the principle that by operation of law there was a surrender of the old lease and a new lease of the premises including the fixtures made.

There is no doubt that when a tenant takes a new lease, in the absence of any exception in the lease, the fixtures when attached to the land pass by the lease as the property of the landlord to the tenant.

It was said by the late Chief Justice of this Court, at p. 74 of the report, when delivering judgment on the demurrers in this case, that "If a tenant, then, with a right to remove fixtures, surrenders his term either directly or by operation of law, and takes a new lease, the result seems to be that the fixtures are included as part of the property leased by the landlord, and in this view the tenant would lose his right to remove, though in possession under the new lease, and no actual entry by the landlord under the surrender."

It is not pretended that there was any surrender by deed, but the contention is, that on one or other of the occasions mentioned there was a surrender by operation of law.

This term is applied to cases where the owner of a

particular estate has been a party to some act, the validity of which he is by law afterwards estopped from disputing and which would not be valid if his particular estate continued to exist. Then the law treats the doing of such an act as amounting to a surrender. Thus if a lessee for years accept a new lease from his lessor, he is estopped from saying that his lessor had not power to make the new lease, and as the lessor could not do this till the prior lease had been surrendered, the law says that the acceptance of such new lease is of itself a surrender of the former: per Parke, B., in *Lyon v. Reed*, 13 M. & W. 285, 305. See also *Bac. Ab.* "Leases and Terms for Years," S. C. 3; *Morrison v. Chadwick*, 7 C. B. 266.

It has never been held, so far as I am aware, that the mere abatement or increase of rent, payable in respect of the demise, is a surrender of the old tenancy. I know of no such authority, and certainly none was cited in the argument by counsel for the plaintiff.

The mere cancelling, in fact of a lease is not a surrender of the term thereby created under the Statute of Frauds: *Roe d. Berkeley v. Archbishop of York*, 6 East 86; see also *Doe d. Burr v. Denison*, 8 U. C. R. 185. Nor is a recital in a second lease that it was granted in part consideration of the surrender of a prior lease of the same premises, a deed or note in writing within the meaning of the statute: *Ib.* A tenancy from year to year, created by parol, is not surrendered by a parol notice from the landlord to quit in the middle of the quarter, and the tenants quitting the premises accordingly: *Mollett v. Brayne*, 2 Camp. 103.

Where a tenant from year to year by a Lady Day holding agreed by parol with his landlord to quit at the ensuing Lady Day, which was within half a year, and the premises were re-let by auction at which the tenant attended and bid, but the tenant was not let into possession, there was held to be no surrender: *Doe d. Huddleston v. Johnstone*, Mc. C. & Y. 141; and see also *Johnstone v. Huddleston*, 4 B. & C. 922.

The law would be different if the landlord notified the



tenant to quit, and in consequence the tenant quit, and the landlord accepted possession : *Grimman v. Legge*, 8 B. & C. 324. The acceptance of a fresh lease, which has been avoided contrary to the intention of the parties thereto, and has then failed to pass the interest contracted for, is not in itself a surrender of a prior lease : *Doe d. Biddulph v. Poole*, 11 Q. B. 713. An eviction by a landlord of his tenant from a part of the demised premises, creates a suspension of the entire rent during the continuance of the eviction, but does not operate as a surrender of the term : *Morrison v. Chadwick*, 7 C. B. 266. The assent of the tenant of a term of years to the creation of a new tenancy in favour of a third party may operate as a surrender : *Thomas v. Cook*, 2 B. & Al. 119 ; see also *Bees v. George*, 2 C. M. & R. 581 ; *Walker et al v. Richardson*, 2 M. & W. 882 ; *McDonell v. Pope*, 9 Hare 705 ; *Nickells v. Athersione*, 10 Q. B. 944 ; *Phené v. Popplewell*, 12 C. B. N. S. 334 ; *Davison v. Gent*, 1 H. & N. 744.

In *Lynch v. Lynch*, 6 Ir. L. R. 131, it was held that a demise by the lessor to a stranger with the assent of the lessee, possession accompanying the act, is a surrender by operation of law of the lessee's interest, whether freehold or chattel. But in *Lyon v. Reed*, 13 M. & W. 285, 309, Baron Parke, while doubting the decision of *Thomas v. Cook*, 2 B. & Al. 119, did not feel justified in overruling it and declined to extend the doctrine of the case. In *Creagh v. Blood*, 3 Jones & L. 133, 151, Lord St. Leonards expressly disapproved of *Eynuch v. Lynch*, 6 Ir. L. R. 131, and agreed that the decision of *Thomas v. Cook*, 2 B. & Al. 119, is not to be extended.

In *Clarke v. Moore*, 1 Jones & L. 723, 728, Lord St. Leonards said : " I should be sorry to hold that because the landlord abates the rent for a time or permanently, he therefore abandons the whole contract. It is one thing for a landlord to say to his tenant, ' I will take a lesser rent, you still continuing to hold according to the terms on which you now hold,' and another thing to say, ' I will create a completely new tenancy in lieu of the former.' I should

do a most mischievous thing were I to hold that a mere abatement of rent, which occurs every day, would altogether put an end to the existing contract and create a new tenancy from year to year. The abatement of the rent was rather a confirmation of the existing tenancy with a relaxation of one of the terms of it. It was then said that the effect of the new agreement was to create a new tenancy in which the existing tenancy would merge, a sort of implied surrender. There is no authority for such a position."

In *Crowley et al. v. Vitty*, 7 Ex. 319, where by a written memorandum the plaintiffs let to the defendant premises at a rent of 20s. a week, and during this tenancy the plaintiffs verbally agreed to accept from the defendant 16s. a week, which was accordingly paid, and on two occasions the defendant submitted to a distress for that amount, it was held that no new demise was thereby created. See also *Kelly v. Patterrson*, L. R. 9 C. P. 681, where the rent was increased.

The following cases may also be referred to on the general question of surrender by operation of law: *Doe d. McDonnell v. McDougall*, 3 O. S. 177; *Grant v. Lynch*, 6 C. P. 178; *McLeod v. Darch*, 7 C. P. 35; *Horton v. MacConnichy*, 9 C. P. 186; *Ellsworth v. Brice*, 18 U. C. R. 441.

The conclusion we draw from the cases is, that neither the increase of the rent from £45 to \$400, nor the subsequent reduction from \$400 to \$300, under the circumstances detailed in the evidence, operated as a surrender of the old tenancy, so as to estop defendants from claiming the fixtures.

It cannot be seriously contended that what took place between Counsell and the defendant operated as a surrender of the then existing tenancy for any purpose. It was no more than an attornment of the defendants to Counsell under the then existing tenancy.

The rule must be made absolute to enter the verdict for the defendants.

*Rule absolute.*

## ROBERT BOND V. PATRICK J. TREAHEY.

*Promise to answer for the debt of another.—Statute of Frauds.*

One A. had contracted to build certain houses for defendant, and the plaintiff agreed with A. to do the brickwork; but having some doubts as to A.'s ability to pay, the plaintiff hesitated to go on. The defendant told the plaintiff that he would see him paid, whereupon the plaintiff proceeded and finished the work.

*Held*, that the defendant's promise was within the Statute, and being verbal only the plaintiff could not recover, for A.'s liability to the plaintiff continued, and defendant's only liability arose from this promise.

DECLARATION: on the common counts for goods bargained and sold, work done, and materials provided, &c.

Pleas: never indebted, and payment.

Issue.

The particulars of the plaintiff's claim were as follows

July, 1874.

Dr.

To amount of contract for facing houses on Par-

liament street ..... \$700

Extras, stone foundation on front brick-work and

for pointing ..... 151 25

---

\$851 25

Cr.

Deductions:

Chimney-stacks not built..... \$152 00

Cash on account..... 450 00

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602 00

Balance claimed..... \$249 25

The case was tried without a jury before Patterson, J., at the Toronto Assizes, in February, 1875.

It appeared that on the 5th of February, 1874, defendant entered into a written agreement with one William Armstrong for the doing of all the carpenter's, joiner's, mason, brick, tin, plaster, painting, and excavation necessary in the erection of two brick-fronted frame dwellings on Parliament street, in the city of Toronto, the work to be fully completed on or before the 1st of July, 1874, and

to be done under the superintendence of Messrs. Martin & Lalor, architects.

The contract price was \$2200 for the two houses, but it was afterwards altered to \$4000 for four houses, and there was evidence, shewing that stonework was afterwards included.

Mr. *Martin*, one of the architects, was called as a witness for the plaintiff. He swore that plaintiff made a verbal tender to Armstrong to do the brick facing and chimney-stacks for \$700, and made a verbal contract to that effect; that plaintiff afterwards, for some reason, refused to go on with the work for Armstrong; that plaintiff and defendant and the witness then met; that plaintiff said he would not do the work for Armstrong, because Armstrong owed him \$250; that the job had not then been commenced; that defendant said he would pay him (plaintiff) if he would go on with it, and plaintiff started next morning with the brickwork, and finished it; that afterwards defendant wanted a stone foundation, which was not in Armstrong's contract, and plaintiff went on and did it; that the stonework was worth \$151 25; making, with the \$700 for the brickwork..... .. \$851 25

That he deducted for contract work not

done .....	\$152 00	
And for payments .....	450 00	
Leaving due to plaintiff.....	249 25	
	<hr/>	\$851 25

He swore, on cross-examination, that he did not include the stonework in any weekly statement to Armstrong, for that Armstrong, in his opinion, had nothing whatever to do with it; that Armstrong failed in his contract, and defendant himself finished the houses.

Plaintiff gave evidence, in some respects, to the same effect, but denied that he had ever agreed with Armstrong to do the work for him, and stated that he did the work for the defendant, defendant promising to pay him for whatever work he did for him.

Defendant was called as a witness, and denied that he



ever made any bargain whatever with the plaintiff, or promised, in any manner, to pay the plaintiff for work done; that he did not know the plaintiff in the matter; that his contract was with Armstrong, and Armstrong alone; and that his contract with Armstrong included the stonework as well as brickwork; and that plaintiff's testimony, to the contrary, was not correct.

Witnesses were called in rebuttal to shew, from facts and circumstances, to which they testified, that defendant's account of the transactions was not correct. Other facts were proved, which fully appear in the finding of the learned Judge, hereafter mentioned.

Counsel for the defence, at the close of the whole case, objected that there was no contract by defendant to pay plaintiff for work done; that the contract, if any, was void under the Statute of Frauds; that Armstrong was not shewn to have been relieved either from his contract with the defendant or his contract with the plaintiff, so that defendant's promise, if any, was collateral.

Counsel for the plaintiff argued that there was a contract shewn between the plaintiff and the defendant, and that the contract, under the circumstances, was original, and not collateral, referring to *Mountstephen v. Lakeman*, L. R. 7 Q. B. 196, reversing S. C., L. R. 5 Q. B. 613; see also S. C., L. R. 7 H. L. 17.

The facts, as found by the learned Judge, were, that Armstrong contracted to build houses for defendant; that the contract included the building of a brick front upon a wooden sill, and brick chimneys; that defendant and Armstrong verbally agreed, after the written contract was made, and before any dealing between plaintiff and defendant, that a stone foundation should be built for the brick front in the place of the sill; that defendant intending to provide for the expense of the stonework by dispensing with some of the chimneys; that plaintiff verbally agreed with Armstrong to do the brickwork of Armstrong's contract for \$700, and made preparation for the doing of it by delivering at the building a portion of the brick; that plaintiff

was afraid Armstrong would not pay him, and something took place between the plaintiff and the defendant, which the plaintiff says was an original agreement by defendant to pay for the work on the footing that plaintiff was working for defendant, and not for Armstrong; that defendant does not say he only guaranteed to plaintiff the payment by Armstrong of the contract price, but absolutely denies having made any promise at all, or having had any negotiation whatever with the plaintiff; that if a promise was made, it was only collateral; that the work done by the plaintiff, both the stonework and the brickwork, was done under his verbal contract with Armstrong; that Armstrong remained liable to him, notwithstanding that plaintiff may have been distrustful of Armstrong, and would not have done the work without defendant's guarantee that although the plaintiff received from the defendant whatever money he received for his work, these payments were made on the certificates of the architects, given on the Armstrong contract; that the whole account of the transaction, as given by plaintiff and his witnesses, both in the first place and in rebuttal, shews that defendant was surety only for the undertaking of Armstrong; that apart from the statute, something took place between plaintiff and defendant, and that defendant's statement that no bargain of any kind existed is untrue.

The learned Judge concluded by stating he found great difficulty in saying what did take place, or what the bargain was (giving his reasons); but on the whole, found that defendant did give plaintiff to understand "that he would see him paid;" and that the plaintiff proceeded with the work on that understanding; but he was not satisfied that defendant assumed any original liability, and therefore entered a nonsuit, stating, that if the plaintiff was entitled to a verdict, the amount should be \$249.25; and that if the plaintiff was entitled to the stonework as an original order to himself, the amount should be \$151.25.

*F. Osler*, in Hilary Term, February 12, 1875, obtained a rule *nisi*, calling on the defendant to shew cause on the

first day of Easter Term then next, why the nonsuit should not be set aside, and a verdict entered for the plaintiff for \$249.25, or for such other sum as the Court might think proper, pursuant to the Law Reform Amendment Act, on the ground that upon the law and evidence the plaintiff is entitled to recover, and the learned Judge who tried the cause should have so found.

In this term, November 29, 1875, *McMichael*, Q.C., shewed cause. The promise, if any, of the defendant, was clearly collateral, and void, for want of writing, under the Statute of Frauds. He referred to *Mountstephen v. Lakeman*, L. R. 5 Q. B. 613; S. C., L. R. 7 Q. B. 196; S. C., L. R. 7 H. L. 17.

*F. Osler*, contra. The contract, if any, with Armstrong was put an end to by defendant, and Armstrong was discharged: *Dullea v. Taylor*, 34 U. C. R. 12; and the performance of an act which a person has agreed with another to perform is a good consideration to support a contract with a third person, when the latter derives a benefit from the performance, and is enforceable whenever there is only one party liable, as here: *Scotson v. Pegg*, 6 H. & N. 295; *Browne* on the Statute of Frauds, 2nd ed., 194, 197.

December 23, 1876. HARRISON, C. J., delivered the judgment of the Court.

We think the finding of the learned Judge, on the facts, is as much in favour of the plaintiff as warranted by the contradictory character of the evidence given at the trial; and in this view the only question is, whether, on the finding, the promise of the defendant required writing to make it a valid promise.

The learned Judge found that there was a contract between Armstrong and plaintiff for the doing of the work (brickwork as well as stonework) done by the plaintiff; that plaintiff had some doubts about Armstrong's ability to pay, and he was about to refuse to do the work, when defendant gave the plaintiff to understand "that he would see him paid;" and that plaintiff proceeded with the work, and did it upon this understanding.

Upon this finding we see, first, a promise from the plaintiff to Armstrong to do the work, on the promise of the latter to pay, and a promise of the plaintiff to the defendant to do the same work on the promise of the latter "that he would see him paid."

There can be no doubt that the performance of an act which a person has agreed with another to perform is a good consideration to support a contract with a third person, if the latter derives benefit from the performance, and *Scotson et al. v. Pegg*, 6 H. & N. 295, cited by Mr. Osler, is a direct authority on that point, if authority be necessary.

But the question whether a particular case comes within the fourth section of the Statute of Frauds depends "not on the consideration for the promise, *but on the fact of the original party remaining liable, coupled with the absence of any liability on the part of the defendant or his property, except such as arises from his express promise:*" *Forth v. Stanton*, 1 Wms. Saunders, (ed. of 1871,) 233.

This test received the approval of the Court of Queen's Bench in *Lee et al. v. Mitchell*, 23 U. C. R. 314, and of the Court of Common Pleas in *Merner v. Klein*, 17 C. P. 287,

Now let us apply it. There was nothing to shew that Armstrong's liability was ever extinguished. There was nothing to shew that he did, as in *Dullea v. Taylor*, 34 U. C. R. 12, on plaintiff's refusal elect to treat the contract as rescinded. His subsequent insolvency would not *per se* rescind the contract: *Gibson v. Carruthers*, 8 M. & W. 321, 324; *Valpy v. Oakeley*, 16 Q. B. 941; *Berndston v. Strang*, 19 L. T. N. S. 40. See also *Newhall v. Vargas*, 13 Maine 93, S. C. 15 Maine, 314. He is not shewn to have been present when the alleged promise is said to have been made by defendant to plaintiff. There was nothing to shew that if a substitution were intended he was any party to it. He was not examined as a witness in this case. There was nothing from which we can say there was a novation—the substitution of the defendant for Armstrong. The original liability continued till discharged. The onus



is on the plaintiff to shew that it was discharged. It seems to us that he has entirely failed to do so: *Goodman v. Chase*, 1 B. & Ald. 297. See also *Anderson v. Curtis*, 9 Verm. 130; *Wood v. Corcoran*, 1 Allen 405; *Williams v. Little*, 6 Shaw 323; *Quintard v. DeWolf*, 34 Barb. 97.

This being so, the original liability must be held to continue, and the second promise cannot, on the finding, be looked upon as otherwise than collateral.

The expression, "I will see you paid," is equivocal. It is, without more such an expression as would afford evidence, under particular circumstances, of an original promise on the authority of *Mountstephen v. Lakeman*, L. R. 7 Q. B. 196, as affirmed by the House of Lords in L. R. 7 H. L. 17. But we cannot say, on the facts, that the learned Judge who tried the cause was wrong in holding that it was only collateral. On the contrary, looking at the written evidence, and the conduct of the parties, we think the weight of evidence is greatly in favour of the finding.

The remaining part of the test—the absence of any liability on the part of the defendant or his property, except such as arises from the express promise, is too clear to justify any further reference to it.

The result is, that in our opinion the rule *nisi* must be discharged.

We may add that this result is in accordance with the decision of this Court in the case of *Rounds v. May*, 35 U. C. R. 367. See also *Mallett v. Bateman*, 16 C. B. N. S. 530 affirmed by the Exchequer Chamber, in L. R. 1 C. P. 163.

*Rule discharged.*

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## POUCHER V. TREAHEY.

*Guarantee—Statute of Frauds.*

A. contracted to build houses for defendant, and sub-let the plastering to the plaintiff. The plaintiff commenced the work, but refused to go on without security, whereupon A. gave him a written order to the architects to give him certificates for the plastering as the work proceeded. After this the plaintiff got money from time to time from the architects without reference to A. A. failed, and the plaintiff stopped work for some weeks, when the defendant told him to go on, saying he, the plaintiff, knew all was right; and he thereupon went on and completed the work.

*Held*, that there was no substitution of the plaintiff for A., but that A.'s liability continued; and that defendant's promise being collateral, and verbal, was void, under the Statute of Frauds.

ACTION in the County Court of York, ordered to be tried at the Assizes.

Declaration: on the common counts for goods bargained and sold, goods sold and delivered, and for work and labour done, and materials provided.

Pleas. Never indebted, and payment.

Issue.

The action was brought substantially to recover a balance of \$159.06, for plastering done by plaintiff on houses of the defendant, situate on Parliament street, in the city of Toronto. The cause was tried before Patterson, J., at the Toronto winter assizes, 1875, without a jury.

The houses were the same houses as mentioned in *Bond v. Treahey ante*, p. 360. It was proved that one Armstrong had a contract in writing for the building of them for defendant at a lump sum, and afterwards made a verbal sub-contract for the plastering of them with the plaintiff.

Armstrong was called as a witness in this case. He proved his contract with the defendant for the whole of the work, and afterwards sub-let the plastering to plaintiff, at 19½ cents per yard. Plaintiff commenced the work under the sub-contract, and then refused to go on without security. Thereupon, he, on the 29th of April, 1874, received from Armstrong the following order, addressed to Messrs. Lalor & Martin, the Architects:—

"Toronto, 29th April, 1874,

"MR. TREAHY'S HOUSES,

"LALOR & MARTIN, Architects,—

"Please give Mr. Poucher certificates to the amount of 85 per cent. of the contract value of the plaster work on the above houses as the work proceeds, and the balance when the time stipulated in my agreement for final payment falls due.

"WM. ARMSTRONG."

"The same as above in reference to Mr. Bond's contract.

"WM. ARMSTRONG."

After the order, plaintiff got whatever money he wanted from Messrs. Lalor & Martin, without going to Armstrong for it. Armstrong stopped work about the middle of July. After that Armstrong swore he heard defendant tell plaintiff "to go on and finish the work." The plaintiff swore that his agreement with Armstrong was a verbal one: that he did not commence to do the work till he told defendant he would require some security: that he had delivered lath on the ground, but refused to put it inside till he got security, that he found after he had taken the job that Armstrong was not a responsible person, and Armstrong said he had no objection to give defendant "as security:" that plaintiff then spoke to defendant, and told him he, plaintiff, wanted him to be responsible for the price of the plastering before he, plaintiff, would proceed: that defendant said he left the whole of his affairs in the hands of his architects: that the money was in a bank or building society, and if the architects would consent, it was the same as himself, and he promised to speak to the architects.

Plaintiff also swore that afterwards he asked Mr. Lalor, one of the architects, in presence of defendant, to accept an order, and had one written out: that Lalor said if he would call at the office sometime when Armstrong was down, he would write an order: that Armstrong afterwards signed the above order: that plaintiff thereupon went on and lathed and first-coated the job: that this was done

before Armstrong failed: that it was not all lathed or first-coated when Armstrong failed: that he had then drawn \$500, and the job did not then owe him over \$5 or \$10: that when Armstrong failed he, plaintiff, stopped and was off the work for two or three weeks: that there was nothing to do, and he did not know who was to pay him: that defendant told him to go and do the balance of the work, and that plaintiff knew "all was right:" that he then went on and completed the work: that there was nothing in writing between him and the defendant.

Mr. *Martin*, one of the architects, was also called as a witness for plaintiff, and swore that plaintiff had not begun the work when he became distrustful of Armstrong: that he heard plaintiff requiring "security" as he was not satisfied with the responsibility of Armstrong: that Armstrong "practically abandoned" the work about the 20th of June; that at that time \$500 had been advanced to plaintiff, and that there was about \$500 worth of work to be done.

Mr. *Lalor*, the other architect, was also called as a witness, and corroborated the plaintiff's testimony as to what took place about the order from Armstrong.

*Robert Bond* was also called as a witness for plaintiff, and swore that defendant said to him that Armstrong seemed not to be going to finish the work, and it was a good job for him, witness, and Poucher, that he, defendant, had agreed to pay them. This, with the exception of some evidence as to the value of the plastering, was all the evidence adduced on the part of the plaintiff.

At the close of the case on a motion for a nonsuit, the learned Judge held that the contract sued on was collateral only, and required a writing. He accordingly nonsuited the plaintiff.

During Easter term last, May 19, 1875, *Tilt* obtained a rule *nisi*, calling on the defendant to shew cause why the non-suit should not be set aside and a verdict entered for the plaintiff for \$171.22, or for such other sum as the Court might think proper, pursuant to the Law Reform Amendment Act, on the ground that the plaintiff was



entitled to recover on the law and evidence, and the learned Judge who tried the cause should have so ruled.

In this term, November 29, 1875, *McMichael*, Q. C., shewed cause. On the authority of the cases cited in *Bond v. Treahey*, ante, p. 360, the contract is clearly collateral and void for want of a writing as required by the Statute of Frauds.

*Tilt*, contra. There was no contract between Armstrong and plaintiff, when defendant promised to pay plaintiff. If there was an existing contract with Armstrong the work that the plaintiff was to do was taken out of it. In July, defendant took the work off Armstrong's hands, and after this the work was done in respect of which the plaintiff sues. He relied upon *Hargreaves v. Parsons*, 13 M. & W. 561, in addition to the other cases cited in *Bond v. Treahey*, ante p. 360.

December 23, 1875. HARRISON, C. J., delivered the judgment of the Court.

If at the time the defendant promised to pay plaintiff, there was an existing contract between Armstrong and the plaintiff, the promise of the defendant was, we think, for the reasons given in *Bond v. Treahey*, collateral and required writing.

We do not see in this case anything more than in *Bond v. Treahey*, to shew that the contract between Armstrong and the plaintiff ever was rescinded. The alleged insolvency of Armstrong certainly would not *per se* have that effect. There is no pretence for the contention that any portion of the plaintiff's work was taken out of Armstrong's contract, or that the plaintiff was in any manner by agreement of the parties substituted for Armstrong. Armstrong, who was examined as a witness in this case, does not say that there was any agreement of the kind. Nor does the plaintiff. Nor does any other witness called on the plaintiff's behalf.

All that the plaintiff wanted was "security," in other words something collateral to Armstrong's liability. He

had not entire confidence in Armstrong's ability to pay, and for that reason required security. At first he obtained the order of Armstrong to the architects for the payment to him of moneys falling due on Armstrong's contract. Afterwards he obtained, as he swears, the defendant's promise, who said to the plaintiff he knew "he was all right."

This promise, it appears to us, was clearly collateral to the liability of Armstrong, which the plaintiff so much distrusted, and unfortunately for the plaintiff, not being in writing, was not "all right," but "all wrong."

It is too late now to question the wisdom of the Statute of Frauds. In some cases it operates unjustly, but its general operation in the prevention of fraud and perjury is beneficial. The only wonder is, that considering its great age and the vast number of decisions under it, there is so much ignorance as to its general provisions among merchants and intelligent mechanics; but ignorance of the law cannot, of course, be heard as an argument for not giving full effect to the law. The authorities to which we have referred in *Bond v. Treahey ante*, p. 360, shews that the nonsuit in this case was a proper one. The additional authority cited by Mr. Tilt, *Hargreaves v. Parsons* 13 M. & W. 561, is inapplicable.

The statute, in the words of Lord Wensleydale in *Hargreaves v. Parsons*, applies only to promises made to the person to whom another is already, or is to become answerable. It must be a promise to be answerable for a debt or a default in some duty by that *other* person *towards the promisee*.

In *Hargreaves v. Parsons*, it was shewn that Parker had not contracted with the plaintiff, nor was it intended that he should. The non-performance of Parker's contract with the *defendant*, could be no default towards the *plaintiff* and consequently the undertaking by the defendant in that case was no promise to answer for the default or miscarriage of Parker in any debt or duty of Parker towards the plaintiff. It was, therefore, an original promise that a certain thing should be done by a third person, and so not

under the statute. Here, there is first the promise of Armstrong to the plaintiff, and secondly, the promise of the defendant to the plaintiff both in respect of the same work at the same price. The latter—the secondary or collateral promise—the statute declares must be in writing.

*Hargreaves v. Parsons*, 13 M. & W. 561, has in England been followed by *Fitzgerald v. Dressler*, 7 C. B. N. S. 374; *Reader v. Kingham* 13 C. B. N. S. 344, and both in England and the United States rests on the foundation to which we have adverted, and none other. See *Leonard v. Vredenburg*, 8 Johns N. Y. 29, and other cases cited in the note to the American reprint of 13 C. B. N. S. 356.

We are of opinion that the rule must be discharged.

*Rule discharged.*

## THE CORPORATION OF THE TOWNSHIP OF BROCK V. THE TORONTO AND NIPISSING RAILWAY CO.

*R. W. Co.—Taking gravel from road allowance—Action therefor—Limitation clause—C. S. C. c. 66, sec. 83.*

The persons constructing a railway took gravel, for the purpose of ballast, from a road allowance at or near where the railway crossed it. The pathmaster of the corporation forbid them; and on compensation being demanded from the railway company, their superintendent wrote to the township clerk admitting that they should have got permission before taking it, and asking what damages they expected, saying that the company would of course do what was right. Afterwards they made an offer by way of settlement, which was not accepted.

*Held*, that the company were liable for the trespass; that the plaintiffs could maintain an action therefor; and that the six months' limitation clause, C. S. C., ch. 66, sec. 83, did not apply, the wrong complained of being an illegal act, not necessarily connected with the construction of the railway more than the appropriation of any other property to their use.

DECLARATION. First count: that before and at the time of the trespass hereinafter mentioned there were surveyed and established divers allowances for public roads within the said township, upon and in which allowances there were divers large quantities of gravel and sand of

great value, and the plaintiffs as such Corporation were entitled thereto, yet the defendants entered into and upon the said public road allowances, and dug up, removed, and carried away therefrom large quantities of sand and gravel, and converted the same to their own use.

Second count: that before and at the time of the trespasses hereinafter mentioned there were certain public road allowances in the said township—that is to say the fifth concession of the said township, and the side-road between lots twelve and thirteen in the third concession of the said township; and the defendants by their servants wrongfully entered into and upon the said public road allowances, and dug up, removed, and carried away divers large quantities of sand and gravel therein and thereon then being, and disposed of the same to their own use.

Third count: that the defendants converted to their own use, and wrongfully deprived the plaintiffs of the use and possession of the plaintiffs' goods: that is to say, large quantities of sand and gravel.

Pleas: 1. Not guilty by statute: Consol. Stat. C. ch. 66, secs. 9, 11, 12, and 83; 31 Vic. ch. 41, sec. 2, O., both public Acts.

2. Leave and license.

3. To the third count: that said goods were not the plaintiffs' as alleged.

Issue.

The cause was tried at the Summer Assizes for Toronto before Patterson, J., when a verdict was rendered for the plaintiffs for \$640.

It appeared from the evidence given at the trial that the defendants' railway crosses the allowance for road between the fourth and fifth concessions of the said township, and on this allowance for road there is gravel which the parties constructing the railroad took for the purpose of ballast, leading tracks into the road allowance for the purpose of taking the gravel. The defendants began to cut out the gravel pit, and the plaintiffs' path-master forbid the work-



men from taking the gravel away. They said they were authorized to take it by the company. He again forbid them in the spring of 1872. The foreman said they would take it; all the township could get was damages; that they were authorized by the Boss to take it, and they could not do without it for ballast. They took away gravel in the summer of 1872 and in the spring of 1873, and again in the fall of that year. In September, 1872, the plaintiffs authorized their clerk to demand satisfaction for gravel taken off the fifth concession, and notify the company to refrain from taking gravel in future. On the 4th of October, 1872, the defendants' superintendent wrote the township clerk, explaining how the gravel was taken, and the necessity of cutting down the hill to enable the railway to pass the road, and intimating that there was not much gravel taken, and concluding as follows: "I admit that we should have got permission before cutting away any of the hill, but, unfortunately, at the time, I was laid up with sickness, and the contractors went to work before I was made aware of the matter. Please say what damages you expect. The company will, of course, do what is right." On the 15th of May, 1873, the council passed a resolution instructing the clerk to notify the defendants that they claimed \$400 damages for the taking of the gravel; that they forbid the defendants taking any more of the gravel; and requested the company to make the approaches to the railway throughout the township of a proper grade. On the 1st of September the clerk of the corporation wrote the defendants' secretary, requesting a reply to their resolution of the 16th of May. On the 9th of September the council passed a resolution that unless the amount claimed of the defendants for gravel taken out of the gravel hill in the fifth concession, and also gravel taken off the side-road in the third concession of Brock, as claimed in the resolution of the council of the 15th of May, be settled at once, the reeve was instructed to take legal proceedings against the company to recover the same; and also to repair all crossings leading across the railway. This resolution was communi-

cated to the defendants in a letter of the 18th of September 1873. The defendants, on the 3rd of September, by their engineer, wrote to the plaintiffs in reply to their letter of the 1st of September, that they would put the road at the fifth concession of Brock in good order, and give to the township council as much gravel out of the adjoining gravel pit as they had removed from the concession line, as a settlement of the claim made by the council in their resolution of the 15th of May, 1873. No action was taken by the council on this letter, and on the 11th of November a resolution was passed authorizing the reeve to take advice. A copy of that resolution was sent to the defendants' secretary. There were a great many witnesses called as to the quality of the gravel, and the quantity taken, and its value.

*M. C. Cameron, Q. C.*, for the defendants, contended at the trial: 1. That what was done was either indictable or the defendants were justified in doing what they did under the powers contained in their charter. The power to sell gravel gave no right to maintain this action, and the only remedy was by indictment. 2. All the acts before 1873 were barred by the six months' clause. 3. There was no proof that the acts done were done by the railway company; the statements of the persons who did the acts that they were acting for the company were not evidence against the latter. 4. As to the acts of trespass in 1872, the plaintiffs shew that they were committed by the contractor, and therefore he, and not the company, was responsible. 5. The only civil remedy, if any exists, is by arbitration, to obtain compensation under the statute.

*Harrison, Q. C.*, contra. The 36 Vic. ch. 48, sec. 425 sub-sec. 4, and *The Corporation of the United Townships of Burleigh et al. v. Hales*, 27 U. C. R. 72, shew this action was right. The township had a special interest in the gravel, and were not driven to an indictment. The correspondence shews that the acts were done by the company. 2. The right of action was not restricted to six months, but if so, the

damages may be severed. 4. The action will lie at common law, and the arbitration clauses do not apply.

The learned Judge reserved leave to move on these questions, leaving to the jury the question whether the act done were done by the company; the amount of the damages, and the proportion prior to October, 1873; and also the proportion between 1872 and 1873, in case the company did the work in 1873, and the contractors in 1872.

The jury found that the defendants took gravel from both the road allowances in question, without the leave of the corporation. They assessed the whole damage against the company at 4,000 yards, at 16 cents a yard = \$640. They found that the gravel was taken by the railway company for the construction of their railway. For damages committed by the defendants by their contractor, in the years 1871 and 1872, they found 3,000 yards at 16 cents = \$480; and in respect of trespass committed in 1873, 930 yards at 16 cents a yard = \$148.80. They assessed for damages committed more than six months before the 6th of March, 1874, 3930 yards; and 70 yards at 16 cents a yard, taken in October, 1873 = \$11.20.

In Trinity term, August 27, 1874, *M. C. Cameron*, Q.C., obtained a rule *nisi* to set aside the verdict, and enter a non-suit pursuant to leave reserved; or to reduce the verdict to such of the three sums found by the jury, mentioned in the Judge's notes, or such other sum, as the Court might think just, pursuant to leave reserved; or to set aside the verdict and for a new trial, the verdict being contrary to law and evidence, and for misdirection, in telling the jury that the plaintiffs could recover for the taking of gravel from the road allowance, and in not charging the jury that the plaintiffs' claim was barred, not having been brought within six months after the acts complained of were committed.

In Hilary term, February 9, 1875, *Harrison*, Q.C., shewed cause. Under 36 Vic. ch. 48, sec. 425, sub-secs. 4, 5, the municipal council of any township may make by-laws for pre-

serving or selling timber, trees, stone, sand, or gravel on any allowance or appropriations for a public road, but that right is subject to the provisions of 34 Vic. ch. 19, O., as to allowances for road over which timber licenses have been granted by the Government. *The Corporation of the United Townships of Burleigh et al. v. Hales et al.*, 27 U. C. R. 72, shews that a township council may recover for timber cut on an original allowance for road, though no by-law has been passed in relation to the cutting the same. The same principle applies to sand and gravel. *The Corporation of Wellington v. Wilson*, 14 C. P. 299, 16 C. P. 124, decides that the corporation might bring trespass for an injury to their bridge. In *Prendergast v. Grand Trunk R. W. Co.* 25 U. C. R. 193, where the injury to plaintiff's land arose from the defendants' servants negligently allowing fire to remain on their premises so that it extended over the plaintiff's land, doing injury, it was held not necessary under the Railway Act to bring the action within six months, the injury being independent of any user of the railway by the defendants.

*McMichael*, Q. C., supported the rule. The company have power to enter upon the lands of any corporation: Consol. Stat. C., ch. 66, sec. 9, sub-sec. "*Twelfthly*;" 31 Vic. ch. 41, O. But it is not necessary to go so far as the entry and taking the gravel here was the act of the contractor, for which defendants are not responsible. He also relied on the grounds taken at the trial.

December 23, 1875.—MORRISON J. read the following judgment which had been prepared by RICHARDS, C. J. before his appointment to the Supreme Court, and which was adopted as the judgment of this Court:—

There seems to have been sufficient evidence to justify the jury in connecting the defendants with the acts of trespass complained of.

On the 4th of October, 1872, their superintendent, in writing to the clerk of the municipality explaining how the gravel was taken, said: "I admit that we should have



got permission before cutting away any of the hill, but, unfortunately, at the time I was laid up, and the contractors went to work before I was made aware of the matter. Please say what damages you expect. The company will, of course, do what is right."

On the 1st of September, 1873, the defendants' engineer, on their behalf, offered to put the road on the 5th concession of Brock in good order, and give the township council as much gravel out of the adjoining gravel pit as they had removed from the concession line, as a settlement of the plaintiffs' claim.

Throughout the correspondence there does not appear to be any denial on the defendants' part that they authorized the contractors to take the gravel from the place complained of. On this ground there is evidence to warrant the verdict of the jury.

Then as to the question whether the plaintiffs can maintain an action for gravel taken from the highway. The cases cited by Mr. *Harrison* seem to settle the question as far as this Court is concerned.

As to the right to maintain the action for gravel taken more than six months before the commencement of this suit. None of the cases referred to exactly touch the point. The one which, in its facts, may be said to approach it nearest, is that of *Follis v. The Port Hope and Peterborough R. W. Co.*, 9 C. P. 50. There the company had changed the route of the road after having cut down timber on the first line, and it was said they took part of this timber away after they had selected the new route. And it was also urged that they had cut beyond the line of the road, but this did not appear. It was held that as to the first cutting it was clearly a damage sustained "by reason of the railway," for the land was really taken and cleared with a view of constructing the railway on it; and as to the land secondly taken they had proceeded to arbitrate as to the damages, and therefore the action as to the first alleged trespass would not in any event lie unless brought within the six months.

There was no evidence to show that any portion of the allowance for roads from whence the gravel was excavated and carried away had been taken for the purposes of the railway under the Act; nor was it shewn how near the line of of the railway the places were from whence the gravel was taken.

It is true in one sense the "damage or injury was sustained by reason of the railway," for if there had been no charter for the railway, or it had not been built, their contractors would not have taken the gravel from these allowances for roads. But what they did, as far as we can see, does not appear to have been done in the exercise of any power conferred on them by the Act of Incorporation, or that they or their officers could reasonably suppose they were exercising any such powers.

If a farmer whose land adjoined the railway had a thousand railway ties in a field which he intended to sell, and the company authorized the contractor to take these ties and lay them on their road in a certain section, the damage and injury to the farmer would be sustained by reason of the railway; but we were not referred to any case shewing that it would be necessary to sue the company within six months for this act.

It seems, as the case is presented to us, an illegal act, not necessarily connected with the construction of the railway any more than the taking and appropriating to the use of the company or their contractor of a span of horses or a yoke of oxen belonging to a farmer in the neighbourhood of the road, because it was more convenient for them to get these articles at hand than it would be to purchase them elsewhere. On the whole we see no reason for disturbing the verdict. The rule will, therefore, be discharged.

*Rule discharged.*

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SHANNON v. THE GORE DISTRICT MUTUAL FIRE  
INSURANCE COMPANY.

*Insurance—Misrepresentation of material facts—Knowledge thereof by defendants' agent—Liability.*

Declaration on a policy of insurance against fire of the plaintiff's grist mill.

Fourth plea: that by the policy it was agreed that the plaintiff's application, on which the policy was granted, and the survey and diagram of the premises, and all things therein contained, should be taken as part of the policy, and that if the insured should therein make any erroneous representation, or omit to make known any fact material to the risk, the policy should be void. And the defendants alleged that there was a wooden building 58 feet from the insured premises, which was a fact material to the risk, and to be known to defendants, yet the plaintiff in said application and diagram erroneously represented that said building was 100 feet from said insured premises, whereby said policy was void.

In the fifth plea, after setting out the same condition, defendants alleged that there was a wooden building not shewn on the plan or diagram near the insured premises, which was material to the risk, but that the plaintiff erroneously omitted it.

The ninth plea alleged that the plaintiff erroneously and falsely represented the cash value of the insured premises to be \$9,000, which was a material fact, yet that they were worth much less, as the plaintiff well knew.

The plaintiff replied to the fourth plea: that the insurance was effected, through one M., an agent of the defendants, having authority to solicit make out, and forward applications, to deliver policies when returned, and to collect and transmit premiums: that said agent personally inspected the property, and was fully aware of its position, and of the distance therefrom of the wooden buildings mentioned; and said application and diagram was filled up with the knowledge and approbation of said agent, and transmitted by him to defendants, and neither they nor he objected to the said buildings, or notified the plaintiff that his policy was affected thereby; and further, that there was no fraud or fraudulent representation by the plaintiff in reference to the distance of said wooden building from the property.

There was a similar replication, in substance, to the other two pleas.

*Held*, (HARRISON, C. J., dissenting,) that the replications were bad, for that on the admitted facts the plaintiff knowingly concurred with defendants' agent in a misrepresentation to defendants of material facts, which was a fraud upon defendants; and the denial of fraud was therefore immaterial.

Per WILSON, J.—The power of the agent to bind the company by accepting an application false to his own and the applicant's knowledge could not be assumed from his powers as specified in the plea, though they might afford evidence from which a jury might infer such power.

Per HARRISON, C. J.—Fraud or collusion on the plaintiff's part could not be assumed in the face of the replications denying and in the absence of any rejoinder asserting it; the misrepresentations must be held, therefore, to have been simply mistakes made in good faith; and treating them as such, the defendants, under the facts stated in the replications, would be liable.

DEMURRER. Declaration on a policy of insurance, dated the 4th day of May, 1874, under seal of the defendants, for \$3,000, for the term of one year, ending at noon on the 22nd day of April, 1875, on the plaintiff's grist mill with stone basement, situate, &c., against loss by fire, The declaration alleged that the plaintiff had an insurable interest to the full amount so insured thereon; and that after the making of the said policy, and whilst it was in force, the premises insured were destroyed by fire, whereby the plaintiff sustained damage to the amount insured; and by a clause in the said policy loss, if any, was to be payable to H. H. Strathy, agent for Mr. Gzowski, Toronto, which rights or interest of the said H. H. Strathy and Mr. Gzowski were, since the said loss, assigned and transferred to the plaintiff by assignment, dated the 21st day of January, A.D., 1875. And although all conditions have been performed, &c., and all events and things existed and happened, yet the defendants have not paid, &c.

Pleas. 4. That by the said policy of insurance it was covenanted and agreed that the application of the plaintiff, upon which the said policy was granted, and the survey and diagram of the insured premises, and all things therein contained, should be taken and considered as a part and portion of the said policy, and that if the insured should therein make any erroneous representation, or omit to make known any fact material to the risk, then the said policy should be void. And the defendants say that at the time of the making of the said application, and of granting the said policy, there was a certain wooden house or building situate near to, that is to say, fifty-eight feet from the said insured premises, which was a fact material to the said risk, and to be known to the defendants, yet the plaintiff in the said application and diagram erroneously represented that the said building was situate one hundred feet from the said insured premises, whereby the said policy was and is void.

5. That by the said policy of insurance it was covenanted and agreed that the application of the plaintiff,



upon which the said policy was granted, and the survey and diagram of the insured premises, and all things therein contained, should be taken and considered as a part and portion of the said policy, and that if the insured should make any erroneous representation, or omit to make known any fact material to the risk, then the said policy should be void. And the defendants say that at the time of the making of the said application, and of granting the said policy, there was a certain wooden house or building, other than the one mentioned in the fourth plea, not shewn on the diagram or survey, near to the insured premises, which was a fact material to the said risk, and to be known by the defendants, yet the plaintiff, in his said application and diagram, erroneously omitted the said building, whereby the said policy was and is void.

9. That in and by the application, in the fourth plea mentioned, the plaintiff erroneously and falsely represented to the defendants that the then cash value of the said buildings, being the said insured premises, and the land on which the same was situate, was the sum of \$9,000, and the said representation was of a fact material to the risk and to be known to the defendants, yet the said premises were then of a much smaller cash value, as the plaintiff well knew, whereby the said policy was and is void.

Second replication to the defendants' fourth plea: that the insurance referred to in the pleadings herein was effected by the plaintiff with the defendants through one Charles Morris, an agent of the defendants, having authority to solicit, make out, and forward applications, to deliver policies when returned, and to collect and transmit premiums. And the plaintiff says that said agent personally inspected the property insured, and was fully aware of the position of the same, and of the distance of the said property from the said wooden house or building mentioned in the said plea; and the said application and diagram was filled up with the knowledge and approbation of the said agent, and transmitted by him to the defendants, and neither they or

their said agent raised any objection to the contiguity of the said wooden house or building, or notified the plaintiff that his policy was affected thereby. And the plaintiff further says that there was no fraud or fraudulent misrepresentation on his part in reference to the distance of the said wooden house or building from the property insured.

Replication to the fifth plea: that the insurance referred to in the pleadings was effected by the plaintiff with the defendants through one Charles Morris, an agent of the defendants, having authority to solicit, make out, and forward applications, to deliver policies when returned, and to collect and transmit premiums. And the plaintiff says that the said agent personally inspected the property insured, and was fully aware of the position of the same and of the distance of the said property from the wooden house or building mentioned in the said plea; and the application and diagram referred to in the said plea was filled up with the knowledge and approbation of the said agent, and transmitted by him to the defendants, and neither they or their said agent raised any objection to the contiguity of the said wooden house or building, or notified the plaintiff that his policy was affected thereby. And the plaintiff further says that there was no fraud or fraudulent concealment or omission on his part in reference to the distance of the said wooden house or building from the property insured.

Replication to the ninth plea: that the insurance referred to in the pleadings herein was effected by the plaintiff with the defendants through one Charles Morris, an agent of the defendants, having authority to solicit, make out, and forward applications, to deliver policies when returned, and to collect and transmit premiums; and the said agent personally inspected the property insured, and was fully aware of the character and value of the same, and before and after such inspection solicited and induced the plaintiff to insure the same to the amount mentioned in the said policy; and the said application was filled up with

the knowledge and approbation of the said agent, and transmitted by him to the defendants, and neither they or their said agent raised any objection to the valuation mentioned therein, or notified the plaintiff that his policy was affected thereby; and the plaintiff says that there was no fraudulent misrepresentation on his part as to the value of the said property.

Demurrer to the replication to the fourth plea, on the grounds:

1. That the erroneous representation in the plea mentioned was, as is alleged, a material one for the company to know, and whether fraudulently made or not, or erroneously made with the knowledge of the defendants' local agent, does not, in law, make any difference, and does not release the applicant from the effect of his misrepresentations.

2. It is not alleged that the defendants' said local agent communicated to the defendants his alleged knowledge, that the misrepresentation of fact was known to him, nor that the defendants knew the said representation to be untrue.

3. That the knowledge of the local agent of the facts and misrepresentations in the plea mentioned is not, in law, the knowledge of the company.

4. That it appears that the plaintiff knew that the said Charles Morris had only interim powers, and had no power to bind the defendants by seal or by issuing a policy, and that the application and representations therein made would be the basis of the contract, if entered into with the plaintiff.

Demurrer to the replications to the fifth and ninth pleas, on the grounds that the soliciting of a risk by a local agent does not, in law, excuse an applicant from making correct representations to the company, nor justify him in making false and erroneous statements and representations.

Joinder.

The demurrers were, on 19th October, 1875, argued before Mr. Justice Wilson, sitting out of term for the full Court, when, upon it being represented to him that a similar case had been argued before a Judge of the Common

Pleas, and decided by him in favour of the defendants, he directed that judgment should be entered on the demurrers for the defendants.

The case was re-heard before the full Court during Michaelmas term, November 25, 1875.

*H. Strathy*, for the plaintiff, argued that the company was bound by the knowledge and conduct of their agent, and that the replications were good. He referred to the following cases: *Miller v. The Mutual Benefit Life Insurance Co.*, 7 Am. 122, approved in *Wyld v. London & Liverpool Insurance Co.*, 21 Grant 464; *Columbia Insurance Co. v. Cooper*, 50 Penn. 331; *Staunton v. The Western Insurance Co.*, 21 Grant 578; *Beebe v. The Hartford County Mutual Fire Insurance Co.*, 25 Conn. 51; *Malleable Iron Works v. The Phoenix Insurance Co.*, Ib. 465; *Phillips on Insurance*, 5th ed., sec. 1880; *Hendrickson v. The Queen Insurance Co.*, 30 U. C. R. 108, 117, 118, S. C. in appeal, 31 U. C. R. 547, 555; *Davis v. The Scottish Provincial Insurance Co.*, 16 C. P. 176, 183; *Foley et al. v. Tabor*, 2 F. & F. 663; *Pimm v. Lewis*, Ib. 778; *Beal v. The Park Fire Insurance Co.*, 16 Wis. 241; *New England Fire and Marine Insurance Co. v. Schettler*, 38 Ill. 166.

*F. Osler contra.* The policy is granted on particular conditions, which are shewn by the pleas. They are not only a part of the contract, but the basis of the contract, and are not to be overruled by the knowledge of the agent. He referred to *Anderson v. Fitzgerald*, 4 H. L. C. 484; *Montreal Assurance Co. v. McGillvray*, 13 Moore, P. C. 124; *Crawford v. The Western Assurance Co.*, 23 C. P. 365.

December 23, 1875. HARRISON, C. J.—There is a manifest difference between marine risks and risks upon buildings. Ships when insured are generally not in a situation to be inspected and examined by the insurer, who is therefore obliged to depend on the account of the ship given by the owner; but it is not so with buildings on shore. The



company or their agent has generally convenient means of inspecting them, and seeing their real condition, &c. Per Sir J. B. Robinson, in *Dickson v. The Equitable Fire Insurance Co.*, 18 U. C. R. 246, 249.

An insurance company may, however, in any case, whether marine, house, or life, well choose not to know or learn anything except through the person seeking an insurance, and may say to him: "Upon the faith of your statement we grant you an insurance. You warrant everything you state, in regard to certain particulars on which we require information. With their materiality, or with your *bona fides* of statement in regard to them, we will have no question. You run the risk of stating the truth. We make no further inquiry, and if your statement, on the faith of which we issue the policy, be untrue in any respect, the policy is valueless." Per Chancellor VanKoughnet, in *Mason v. The Agricultural Mutual Assurance Association*, 18 C. P. 19, 22.

A person accepting a policy, whether on life or against fire, on such terms, is in general bound by them, no matter what hardship arise in consequence. See *Anderson v. Fitzgerald*, 4 H. L. C. 484; *Duckett v. Williams*, 2 C. & M. 348; *Geach v. Ingall*, 14 M. & W. 95; *Cazenove v. The British Equitable Assurance Co.*, 6 C. B. N. S. 437; S. C., in error, 6 Jur. N. S. 826; *The Susquehanna Insurance Co. v. Perrine*, 7 Watts & Serg., 348; S. C., 2 *Bennett's Fire Insurance Cases*, 339; *Smith v. The Cash Mutual Insurance Co.*, 24 Penn. 320; *Day v. Conway Insurance Co.*, 52 Maine 60; *Huntley v. Perry*, 38 Barb. 569; *LeRoy v. Market Fire Insurance Co.*, 45 N. Y. 80; *Birmingham v. Empire Insurance Co.*, 42 Barb. 457; *Wilson v. Herkimer County Mutual Insurance Co.*, 6 N. Y. 53; *Abbott v. Shawmut Fire Insurance Co.*, 3 Allen 213.

In this case it is admitted by the pleadings that there was an application signed by the plaintiff: that the application embraced a survey and diagram of the insured premises: that it was agreed that all things therein con-

tained should be taken and considered as a part and portion of the policy, and that if the insured should make therein any erroneous representation, or omit to make known any matter of fact material to the risk, the policy should be void.

It is also admitted by the pleadings that there were erroneous representations in the application in this, that a building, described in the application as insured, 100 feet from the insured premises, was only 58 feet from the insured premises: that another building, near to the insured premises, was wholly omitted from the diagram and survey; and that the cash value of the insured premises, and of the land on which the same was situated was erroneously represented to be \$9,000, though of much smaller cash value.

If there were nothing more in the case, the defendants would, on the authorities cited, be unquestionably entitled to succeed in their defence.

Then arises the important question, whether the new matter contained in the replications, which admit the pleas, is sufficient to avoid the legal effect of them.

The replications shew that the insurance was effected through an agent of the defendants "having authority to solicit, make out, and forward applications, to deliver policies when returned, and to collect and transmit premiums;" that the agent personally inspected the property insured, and was fully aware of the position of the same and of the distance of the wooden house or building mentioned in the fourth plea, and of the omitted building mentioned in the fifth plea: that he was fully aware of the character and value of the insured premises, and before and after the inspection solicited and induced the plaintiff to insure the same; that the application and diagram were filled up with the knowledge and approbation of the agent, were afterwards transmitted by him to the company; and that there was no fraud or fraudulent misrepresentation on the part of the plaintiff.

It is therefore apparent that the insurance company, in accepting this risk, did not choose to rest simply on the

answers to the questions in the application; that their agent, before the risk, inspected the premises, and had a knowledge of the risk and of the facts material to the risk.

I cannot assume collusion or bad faith on the part of the plaintiff or the agent, in the face of the allegation that there was no fraud or fraudulent representation on the part of the plaintiff. Fraud is not to be assumed in any case. I must, on these pleadings, hold that the erroneous representation as to the nearness of a building to the risk, or as to the value of the risk, were simple mistakes made in good faith.

I must hold also that the omission to mention the additional building was also an unintentional mistake. If there was bad faith on the part of the plaintiff, a traverse of the plea will enable defendants to get full advantage of it. If there was fraud or collusion between the plaintiff and the agent that should be rejoined. In the absence of such a rejoinder or any other rejoinder, I must give the replications demurred to a meaning that will support them rather than one which will destroy them: *Tench v. Swinyard*, 29 U. C. R. 319; *Young v. Austen*, L. R. 4 C. P. 553; *Stanton v. Austin et al.*, L. R. 7 C. P. 651; *Corkling v. Massey*, L. R. 8 C. P. 395; *Redway v. McAndrew et al.*, L. R. 9 Q. B. 74; *McCulloch v. White*, 33 U. C. R. 331, 338.

I assume that it was material for the defendants to know the situation of the property intended to be insured and its surroundings—the value of the property, the contiguity of other buildings, their distance, &c. The replications shew that their agent authorized to solicit, make out, and forward applications for insurance, before defendants accepted the risk, inspected the premises, was fully aware of the character and value of the premises, and was fully aware of the position of the same and of the distance of the property from the wooden house and building, &c.

If the replications had averred that the defendants

themselves, before accepting this risk, had acquired the knowledge which the agent is alleged to have obtained, I apprehend they could not now be allowed to assert that they were deceived in any manner by the alleged erroneous representations and omissions in the application for insurance: *Carter v. Boehm*, 1 Smith L. C. 555, 7th ed.; *Pimm v. Lewis*, 2 F. & F. 778, *Foley et al. v. Tabor*, *Ib.* 663; *Bunyon on Fire Insurance*, p. 63.

The question is, whether this is not in effect alleged—in other words, whether the knowledge of the agent, under the circumstances stated in the replications, is not, for the purposes of the risk, to be deemed and taken as the knowledge of the defendants themselves.

If the agent comes to the knowledge of the fact in the course of the very transaction which afterwards becomes the subject of litigation, notice to the agent is in general to be deemed and taken as notice to the principal: *Le Neve v. Le Neve*, 1 Ves. 64; *Story on Agency*, 7th ed., sec. 140.

In *Gale v. Lewis*, 9 Q. B. 730, 738, where a great number of cases on the point were cited in argument, Lord Denman said, at p. 740: "On another point, which was discussed at great length, we are called upon to form some opinion, but can by no means undertake to express one very confidently: we mean the question whether the knowledge of one individual was the knowledge of the company whom the defendant represents in this action. Some late decisions have certainly made it difficult to say what is the correct rule on that subject."

In *Penley v. The Beacon Assurance Co.*, 7 Grant 130, the present Chancellor said, at p. 136: "The local agent must, in my opinion, be treated as the officer of the company to communicate with persons effecting assurances, and what he says or does in that capacity within the proper bounds of his authority must be held binding on the company." See further, *Tucker v. The Provincial Ins. Co.*, 7 Grant 122; *Henry v. The Agricultural Mutual Assurance Co.*, 11 Grant 125, 131; *Burton v. The Gore District Mutual*



*Fire Insurance Co.*, 12 Grant 156; *Rowe v. The London and Lancashire Insurance Co.*, 12 Grant 311.

In *Wyld v. The London and Liverpool Insurance Co.* 33 U. C. R. 284, Mr. Justice Wilson said, at p. 302: "The notice and knowledge in this case, were the notice and knowledge of the defendants, for he was acting strictly within the scope of his duty on the occasion when he received the amendment to the application, and inspected the premises in pursuance of it."

In the case between the same parties in Equity, 21 Grant, 458, 469, Vice Chancellor Blake said: "Here the agent personally inspected the premises. He knew a portion of the goods, the subject of the insurance, was in the added flats. He accepts an insurance on the whole, whether in 272 proper or the added flats. He designates the locality where the goods are stored, as 272. He accepts the increased premium because a portion of the stock is situate in the added flats. He would be, and his knowledge, as to all matters gained in the proper discharge of his duty as agent, being the knowledge of the company, the company is, *estopped* from now denying that the property insured was situated in No. 272."

The decision of the learned Vice Chancellor in this case has been affirmed by the full Court on re-hearing, and has since been upheld in the Court of Appeal.

In *Hopkins v. The Provincial Insurance Co.* 18 C. P. 74, a new trial was ordered, because the learned Judge at the trial *rejected* evidence of what took place between the plaintiff and the agent of the company at the time of the taking of the risk.

Richards, C. J., in ordering the new trial, said, at p. 86: "I think that in order fairly to judge of the answers of the plaintiff, evidence might be given to shew the surrounding facts, as to the situation of the buildings, who owned them, and who owned the land; and to shew the *bona fides* of the plaintiff's answer, I think he might shew that the defendants' agent who drew up the statement had been informed by plaintiff, or some one else to plaintiff's knowledge, of the state of the title to the premises."

In *Patterson v. The Royal Insurance Co.* 14 Grant 169, it was held that the company and not the insured should sustain the loss by reason of the neglect of the agent to communicate information which he had received.

In *Brady v. The Western Insurance Co. (Limited)*, 17 C. P. 597, it was held that the agent through whom the insurance was effected and premiums paid, and who was acting as general manager for the company in Canada, had authority (the policy not being under seal) to waive one of its conditions.

In *Hendrickson v. The Queen Insurance Co.*, 31 U. C. R. 547, there was considerable discussion and differences of opinion between the Common Law and Equity Judges who presided in that case as to the powers of a local insurance agent.

It may be that some of the Equity decisions are in advance of the rulings of the Common Law Judges, and that on the subject of insurance Equity Judges have gone further than Common Law Judges have hitherto ventured to go, but it is now declared that the Courts of Law and Equity shall be as far as possible auxiliary to one another respectively, for the more speedy, convenient, and inexpensive administration of justice in *every case*: Sec. 1 of 36 Vic., ch. 8, O.

If we turn from the very few fire insurance decisions in England, and the comparatively small number in our own Courts of Law and Equity, to the decisions of the United States, we shall find no scarcity of authorities on the points involved in this case, and, though conflicting, the great weight of the authorities will be found to support the sufficiency of the replications here.

If decisions on a point raised for judgment can be found in the Courts of this country they must govern, no matter what the law on the point may be in the United States or any other foreign country. But if there be little or no authority on the point in the decisions of the Courts of this country, and abundant authorities in the Courts of the United States, 1 for one shall be at all times

most happy to avail myself of the decisions of the foreign tribunals, and to be influenced by them, not as binding authorities, but so far as the reasoning in them commends itself to my judgment.

In this I do little more than echo the words of a most distinguished Judge and eminent predecessor in the Court over which I have now the honor to preside. I refer to the language of the late Sir John B. Robinson, as reported in *The Bank of Montreal v. Eelatre*, 5 U. C. R., at p. 368, where he said: "The defendants' counsel, in the argument, referred to American authorities, and it is always advisable and useful on questions of this nature (mercantile agency), to look for information in that quarter, for in applying legal principles to mercantile contracts and dealings, and the remedies upon them, the American Courts have generally gone before those in England in introducing such relaxations as have seemed necessary for the convenience and safety of those engaged in commerce; and they have in some instances gone further, without the aid of Legislative enactments, in moulding the principles of the common law to suit supposed exigencies, than English Courts of Justice have yet ventured to go. Yet as such questions present themselves, they desire to justify the relaxation by as much authority as they can find in favour of it in English decisions, and we may therefore expect to find such authority cited as far as any exists."

These remarks may, with great force, be applied to the law of fire insurance. Several United States Companies are now doing business in Canada. The conditions endorsed on policies of some of the Canadian Companies are taken from conditions endorsed on United States policies. The business relations of the two countries are every day increasing. And in many respects the circumstances of the two countries bear a close resemblance.

In *Plumb v. Cattaraugus County Mutual Fire Insurance Co.*, 18 N. Y. 392, Mr. Justice Platt, in delivering judgment, said, at p. 394, speaking of the agent of the company: "If, therefore, he acted within the scope of his authority by

making these surveys and measurements and in preparing the applications, I do not see why the question is not the same in principle as if the same thing had been done by the company itself. Suppose an individual insurer had himself assumed to make the survey and measurements, and, as in this case, had filled up a blank application, and had represented to the applicants that his survey and measurements were correct, and that upon the faith of such representations, and with no knowledge of the facts themselves, the insured had signed the application and thus made the statements their own, although they had thus been led to a warranty of what was not true, they could not, undoubtedly, change the contract by parol testimony. The writing must still be held to express the contract between the parties; and neither party can insist that the writing is other than what the contract expresses. But when the party through whose acts and representations the other party was induced to enter into the contract claims the right to shew that the facts were different from what he had represented them to be, for the purpose of shewing a breach of the warranty, and thus avoiding what would otherwise be a binding contract, and escaping its obligations, I cannot discover why the doctrine of estoppel may not justly be applied to him, and he be precluded from denying what he once asserted. It presents, I think, the precise case for the application of estoppel *in pais*, as defined in the cases."

In a subsequent case, *Rowley v. The Empire Fire Insurance Co.*, 36 N. Y. 550, the Court, in referring to the foregoing case, said, p. 551: "It must be conceded that this case goes the whole length of establishing the doctrine that, although an application for insurance contains a false statement as to a material matter, the writing must still be held to be the contract between the parties, and that neither party can insist that the writing is other than what the writing expresses, provided such false statement is chargeable to the agent of the company in making the survey and filling up the application, while acting in the line of his duty."



The agent's knowledge of the facts, which shews that the applicant has, in the paper forwarded to the company, not correctly stated the facts, is held, in many cases, to be the knowledge of the company, and to prevent the company successfully defeating the policy by reason of alleged erroneous statements in the application.

In *Michael v. The Mutual Insurance Co. of Nashville*, 10 La. An. 737, it was held that where the insured premises were, before the risk, inspected by the agent of the company, the company was bound by the knowledge of the agent as to all that was apparent on inspection.

In *Cumberland Valley Mutual Protection Co. v. Schell*, 29 Penn. 31, it was held that the insured is not chargeable with an over estimate of the value of the property made by an agent, unless he took some fraudulent part in it.

In *Masters v. The Maddison County Mutual Insurance Co.*, 11 Barb. 624, the company was held bound by the knowledge of the agent, although differing from the information contained in the written application for insurance. See also *People's Insurance Co. v. Spencer*, 53 Penn. 353; *Howard Fire Insurance Co. v. Bruner*, 23 Penn. 50; *Meadowcraft v. The Standard Fire Insurance Co.*, 61 Penn. 91; *Peoria Marine & Fire Insurance Co. v. Hall*, 12 Mich. 202; *Atlantic Insurance Co. v. Wright*, 22 Ill. 462; *New England Fire & Marine Insurance Co. v. Schettler*, 38 Ill. 166; *Miller v. The Mutual Benefit Life Insurance Co.*, 7 Am. 122; *Campbell v. Merchants & Farmers Mutual Fire Insurance Co.*, 37 N. H. 35; *Patten v. Merchants & Farmers Mutual Fire Insurance Co.*, 40 N. H. 375.

In *Southern Insurance & Trust Co. v. Lewis*, 42 Ga. 587, it was held that it is not necessary to recite, in a policy of insurance on a building, that a hazardous business was carried on in an adjoining building, when that fact was known to the insurance agent and an extra premium paid in consequence of the additional risk. See also *Crawford v. The Western Assurance Co.*, 23 C. P. 365.

In *Hodgkins v. Montgomery County Mutual Insurance*

Co., 34 Barb. 213, it is said that knowledge in the agent by whom the insurance is agreed to be made, and who takes and fills out the application, of the existence of incumbrances upon the title, or of prior incumbrances, is knowledge on the part of the company.

Now as to the authority of the agent in this case who inspected the premises. He is described in the pleadings as "having authority to solicit, make out, and forward applications, to deliver policies when returned, and to collect and transmit premiums."

In *Rowley v. The Empire Fire Insurance Co.*, 36 N.Y. 550, it was said by the Court, p. 553, that "It is not establishing a harsh or unreasonable rule in reference to insurance companies, to hold that their agents, authorized 'to take applications for insurance,' are acting within the scope of their authority in everything which they do which may be necessary to complete such applications."

In *Coombs v. The Hannibal Insurance Co.*, 43 Mo. 148, it was held that the authority of an agent to procure applications for insurance carries with it the legal implication of authority to do all things needful to perfect the application.

In *Malleable Iron Works v. Phœnix Fire Insurance Co.*, 25 Conn. 465, it was held that an agent, authorized to procure applications, and furnished with printed blanks containing interrogatories to be answered by the applicant, with regard to the property insured, has, as incidental to such power, authority to make all necessary enquiries and explanations.

In *Columbia Insurance Co. v. Cooper*, 50 Penn. St. 331, the Court went so far as to hold that a stipulation in a policy, that if the agent, in the transaction of their business, should violate the conditions, the violation should be construed as the act of the insured, did not render the insured responsible for the mistakes of the agent. See also *Masters v. Madison County Mutual Insurance Co.*, 11 Barb. N. Y. 624; *McBride v. The Republic Insurance Co.*, 30 Wis. 562.

The best summary of the cases bearing on the points in-

volved in this case that I have seen is in the decision of Chief Justice Day of the Supreme Court of Iowa, in *Miller v. The Mutual Benefit Life Insurance Co.*, 7 Am. 122, 126.

His language is as follows : “ ‘ Is an insurance company, transacting business through an agent having authority to solicit, make out and forward applications for insurance, to deliver over policies when returned, and to collect and transmit premiums, affected by the knowledge acquired by such agent when engaged in procuring an application, and bound by his acts at such time done with respect thereto.” Upon this point there is much conflict in the decisions. In the case of *Vose v. Eagle Life & Health Insurance Co.*, 6 Cush. 42 Mass., it was held that, where an agent of a life insurance company, who was not authorized to agree for insurance, knew of the falsity of a material representation by an applicant, such knowledge would not prevent the company from insisting upon a discharge in consequence of the false representation. The same doctrine was recognized in the case of *Smith v. Insurance Co.*, 24 Penn. St. 320. In *Mitchell et al. v. Lycoming Mutual Insurance Co.*, 51 Ib. 102, it was held that an agent of an insurance company whose duty is to take surveys, receive applications for insurance, examine the circumstances of a loss, approve assignments and receive assessments, is not authorized to accept notice of other insurance, or waive its consequences. And in the case of *Wilson v. Conway Fire Insurance Co.*, 4 R. I. 141, does not stop with a recognition of the foregoing doctrines, but holds that an agent of an insurance company, empowered merely to receive written applications for insurance, to transmit them to the company, and if they decide to take the risk, to receive the policy executed by them, and to issue it to the applicant upon receipt from him of the premium, is *not the agent* of the company for the making of applications ; and if employed by the applicant, or permitted to act for him in drawing up the application, *is his agent*, for whose mistakes of fact committed in the statements or answers to interrogations in the application *he* is responsible. To the same purport, see *Lowell*

v. *Middlesex Mutual Fire Insurance Co.*, 8 Cush. 127; *Forbes v. Agawam Insurance Co.*, 9 Ib. 470; *Lee v. Howard Insurance Co.*, 3 Gray 583. In support of the converse doctrine, see *Rowley v. Empire Insurance Co.*, 36 N. Y. 550. In this case plaintiff stated to the agent, verbally, the facts necessary to meet the requirements of the rules of the company, and, among other things, informed him that the premises were incumbered by mortgage. An application was signed in blank by plaintiff, and given to the agent, he promising to insert, over the signature thus obtained, the particulars thus furnished him, as a basis of the insurance, on his return to his residence. In filling up the application, the agent inserted what was *not* the fact, and in violation of his instructions, that there was *no* incumbrance on the premises. It was held that he was the agent of the company in filling up the application, and that the company was bound by his acts. In the case of *Masters v. Madison County Mutual Insurance Co.*, 11 Barb. 624, it was held that, although the by-laws of an insurance company make the person taking a survey in its behalf the agent of the applicant, still he is the agent of the company also, and it is bound by his acts. In the case of *Septon v. Montgomery County Mutual Insurance Co.*, 9 Barb. 191, it was held that, when a policy of insurance requires that in case of any prior existing insurance upon the same property notice thereof shall be given to the company, notice to an agent authorized to make surveys and receive applications for insurance, and to receive the moneys paid by the assured, is sufficient, and that such notice need not be in writing. In the case of *McEwan v. The Montgomery County Mutual Insurance Co.*, 5 Hill 101, it was held that notice to the traveling agent of the company, whose business was to solicit insurances, make surveys and receive applications, while actually engaged in preparing an application for a policy, was binding upon the company, although the notice never reached the company; and that notice to an agent, relating to business which he is authorized to transact, and while actually engaged in transacting it, will



in general, operate as notice to the principal. See, also, *Rowley v. Empire Insurance Co.*, 3 Keyes 559, and *Anson v. Winneshiek Insurance Co.*, 23 Iowa 84."

The doctrines enunciated in this case are in a note to the case said to have been fully sustained in every particular by a recent decision of the Supreme Court of the United States in *Union Mutual Insurance Company of Maine v. Wilkinson*, 13 Wall, 222, affirming the decision of the Supreme Court of Iowa in *Wilkinson v. Connecticut Mutual Life Insurance Co.*, 6 Am. 657.

The doctrines are equally applicable to fire insurance policies as may be seen by reference to the numerous fire insurance cases mentioned in the same note.

In *May v. The Buckeye Mutual Insurance Co.*, 3 Am. 76, 82, Mr. Justice Paine, of the Supreme Court of Wisconsin, is reported to have said: "The recent cases upon this subject fully sustain the position, that, upon this state of facts, the company is responsible for the accuracy and omissions of its agent, even without an express undertaking to be so, and that it cannot avoid liability by reason of any discrepancy between the real facts as disclosed to him, and his presentation of them in the papers. The tendency of modern decisions has been strongly to hold these companies to that degree of responsibility for the acts of the local agents which they scatter through the country, that justice and the true protection of the people demand, without regard to private restrictions upon their authority, or to cunning provisions inserted in policies with a view to elude just responsibility."

In the *Ætna Live Stock Fire & Tornado Insurance Co. v. Olmstead*, 4 Am. 483, 486, Mr. Justice Cooley, of the Supreme Court of Michigan, is reported to have said: "The insurance business of the world is done through agents almost exclusively, and the maxim *qui facit per alium facit per se*, applies with special force to their acts. These agents assume to have, and generally do have, much more intimate knowledge of the business than those with whom they deal. They may also be fairly presumed to understand the

requirements of their principals, and how properly and legally to fill up the blank applications and other papers with which their principals intrust them. The community in general do not assume to be familiar with these matters, and would not venture in any case to set up their own view of what was or was not the proper form of an application, against the positive assertion of an expert. The forms and requirements of different insurers are different; and when an agent, who at the time and place is the sole representative of the principal, assumes to know what information the principal requires, and after being furnished with all the facts, drafts a paper which he declares to be satisfactory, induces the other party to sign it, receives and retains the premium moneys, and then delivers a contract which the other is led to believe, and has a right to believe, gives him the indemnity for which he paid his money, we do not think the insurer can be heard in repudiation of the indemnity, on the ground of his agent's unskilfulness, carelessness, or fraud. If this can be done, it is easy to see that the community is at the mercy of these insurance agents, who will have little difficulty in a large proportion of the cases in giving a worthless policy for the money they receive."

Chief Justice Day, of the Supreme Court of Iowa, in *Miller v. The Mutual Benefit Life Insurance Co.*, 7 Am. 122, to which I have already referred, is reported, at p. 128, to have said: "These companies select their own agents, require them to enter into bonds for the faithful discharge of their duties, and send them forth provided with blanks, and clothed with all the insignia of authority. If their ignorance or their cupidity leads them to recommend improper risks, it is more in consonance with reason that the loss should be borne by the company than that the assured should be made the victim of the incompetency or the avarice of the agents. More especially is this true in view of the fact that the company has the means of indemnity through the bond of the agent. Just principles of public policy require that these companies should be held to a strict degree of

responsibility for the acts of their agents. They will thus be led to the exercise of a greater circumspection in the selection of agents," &c.

In *The Commercial Insurance Company v. Spankneble*, 4 Am. 583, Mr. Justice Walker, of the Supreme Court of Illinois, used similar language in reference to insurance companies and their agents.

Reference may also be made to the *Dayton Insurance Co. v. Kelly*, 15 Am. 612.

In *Bliss on Life Insurance*, sec. 287, it is said: "Though there has been much difference of opinion, the decided weight of authority is now in favour of the view, that where an agent having authority to take or procure applications, fills out blanks, but does so incorrectly or incompletely, the company, and not the insured, must be the sufferer, either because, in so doing, the agent is held to be the agent of the company, and the company is presumed to do all that he does, and know all that he knows, or because the company is estopped from availing itself of the act or neglect of its agent."

The weight of authority is now in favour of holding insurance companies responsible for the acts and knowledge of their agents, through whom risks are procured, and this upon broad principles of justice and equity.

As said by Chief Justice Day in *Miller v. The Mutual Benefit Life Insurance Co.*, 7 Am. 122, 128: "The business of insurance is rapidly increasing in magnitude and importance, and it is as essential to the companies themselves as to the assured that the rules of law declared applicable to them should be based on just and equitable principles, and administered in a manner in harmony with the doctrines of an enlightened jurisprudence."

No doubt great frauds have been committed on insurance companies. The companies, therefore, not only in their own interest, but in the interest of the community in which they do business, are bound as far as possible to protect themselves against fraud. Courts of justice will go as far as possible to assist them in the accomplishment of this

desire. But, on the other hand, where there is no fraud imputed or imputable to the assured, the Courts are equally bound to go as far as allowed by reason and authority to prevent the defeat of just demands.

If it had been shewn on the pleadings here, as it was shewn in evidence in *Bleakley v. The Niagara District Mutual Insurance Co.*, 16 Grant 198, that at the foot of the paper containing the answers to the several queries propounded by the insurance company, a memorandum was inserted stating that the agents of the company were the agents of the applicant so far as relates to the making of applications, and that the company would not be bound by any statements made to the agent not contained in the application, I should have unhesitatingly held, on the authority of that case, the decision of a Court of co-ordinate decision, at all events until reversed by the Court of Chancery or the Court of Appeal, and notwithstanding the United States decisions to the contrary, that the applicant was bound by the erroneous statement contained in the application, and have left the applicant to his remedy, however worthless it may be in fact, against the agent, on the authority of *McGuffin v. Ryall*, 13 C. P. 115, and *Johnstone v. The Niagara District Mutual Insurance Co.*, 13 C. P. 331.

But on the facts set forth in the replication, and assuming, as I do, for the purposes of this decision, that they are true, and in the absence of any rejoinder or issue setting up fraud or collusion, I do not think that the defendants should be allowed to escape liability from the obligation for which they have received the premium of insurance. See *Wing v. Harvey*, 5 DeG. McN. & G. 265.

I know of no English or Canadian decision which compels me, on these facts, without more, to arrive at a conclusion so unjust; and in the absence of such a decision I must cheerfully follow what I take to be the weight of authority in England and in Canada, supported as it is by the reasoning of the Judges in several of the Supreme Courts of the United States.



I have not overlooked *The Montreal Assurance Co. v. McGillivray*, 13 Moore P. C. 87, cited by Mr. Osler, to which may be added *Walker v. The Provincial Ins. Co.*, 7 Grant 137, S. C. affirmed in the Court of Error and Appeal 8 Grant 217, so far as qualified by *Staunton v. The Western Assurance Co.*, 21 Grant 578, also affirmed by the Court of Error and Appeal; but I think the class of cases, to which these cases belong, entirely distinguishable from the cases on which I rely, and to which I have referred, as sustaining the conclusion at which I have arrived.

In my opinion the replications are good, and the plaintiff entitled to judgment on the demurrers thereto.

WILSON, J.—These controversies between insurers and insured raise very embarrassing questions for the Courts.

Sometimes it is apparent the companies are attempting to evade, according to the literal wording of their policies or conditions, a really just demand by the insured, because he has done or has not done some act of no great consequence to them.

Then the insured sets up a waiver of the act or matter by the company. The company allege the act of waiver itself, if relied upon, was required to be in writing and endorsed upon the policy, and it was neither in writing nor endorsed on the policy. The insured alleges that the formal act of writing was waived too.

These and many other matters become still more troublesome by means of the dealings of the company being carried on by and through agents of the insurers.

The company require the application should state all matters truly, and they refuse to pay because the insured has not done that. He answers that it is of no consequence what the application stated, because the company's agent filled it up, and knew in fact what the real truth was.

The company try to protect themselves against such an answer; and they further provide that their agent to receive the application shall not be their agent, although

he should fill up the policy, but be the agent of the insured.

And then follows the assertion that the company has waived all these objections, or is estopped in some manner by reason of the subsequent payment of premiums, or by some other acts or conduct of theirs, from setting them up.

These and the like difficulties occur when the insured is attempting to impose upon the company, as does actually happen too, for the fault is not always on the one side.

It is not surprising, then, that the decisions of Courts should not always be consistent.

The rule to be observed when the contract is made directly with the company at its head office, must be different when an agent is employed, and the contract is made through him as representing the company with the insured.

It does not follow that whatever the company may do the agent may also do. That which may properly be binding on and against the company, because of their own immediate knowledge of all the facts and circumstances fully communicated to them by the insured, may not be binding on them as a mere consequence, because their agent may happen to know the like matters, although he has never communicated them to the company.

The rule, in such a case, when an agent is employed, must be the plain one, that the acts of the agent will be binding on the principal if the agent had in fact authority so to deal on behalf of his employers, or if the powers he has exercised are fairly within the limits of the duty or functions he had to perform, or if the information communicated to him or the knowledge he has obtained can be considered as so much information or knowledge communicated to or obtained by the principals.

The defendants say the policy is void, because the plaintiff, in his application and diagram, erroneously represented a wooden building to be 100 feet from the insured premises, whereas it was only 58 feet distant; and that he also erroneously omitted from the diagram a wooden building near

to the insured premises which should have been contained in it; and that he also erroneously and falsely over-valued the insured property and land on which it stood. All which several facts were material to the risk, and material for the defendants to have known.

The plaintiff says, "True I filled up the application, and I knew then I was erroneously misrepresenting the distance of the wooden building on the diagram from the insured property; and that I was erroneously omitting the other wooden building from the diagram; and that I was erroneously and falsely over-valuing the insured property and the land on which it stood.

It is true, also, that these were matters which were material to the risk, and should be known by the company before granting the policy. But what of that?

Firstly. I effected the policy through your agent; and

Secondly. His authority was—

1. To solicit, make out and forward applications to you.
2. To deliver policies to the insured when you sent them to him; and
3. To collect for and transmit premiums to you.

Thirdly. The agent personally inspected the premises, and he was fully aware of everything respecting them, and of all the facts and matters so erroneously represented or omitted to be represented by me.

Fourthly. The application and diagram were filled up by me with his knowledge and approbation, and transmitted to you.

Fifthly. I do not say that you ever knew any of these matters which I and your agent knew, and which he and I knew I was erroneously representing to and concealing from you; but certainly neither you nor your agent ever raised any objection to these misrepresentations and concealments, nor ever told me that my policy was affected thereby, although my policy does plainly tell me so.

Sixthly. I say also I was guilty of no fraud or fraudulent misrepresentation whatever in respect of any of these matters; and

Seventhly. Therefore you must pay me the \$3000 I insured the property for, because it was destroyed within twelve days of the expiring of the year that I insured it for."

I certainly do entertain rather a strong opinion that if the plaintiff can recover on the facts in these pleadings there is very little force in any contract, and very little hope or protection for any insurance company.

I am not inclined to favour these companies when they are not acting, as I may think, fairly, or even liberally, but the like rule must be equally applied to the other side. The great object is to enforce the contract as both parties understood it, and honestly intended it to operate. Now the plaintiff knew the three matters complained of were made material articles of the contract, and that he must speak truly with respect to them; yet he erroneously represented two of them, and erroneously concealed the third; and his only answer to the defendants is, that their agent knew all about the facts, and the misrepresentation and concealment he, the plaintiff, was guilty of; and that the defendants must be held bound by their agent's misconduct, which he, the plaintiff, participated in, merely because he was their agent, although the defendants knew nothing of his misconduct, nor that the plaintiff was a partner in it.

The plaintiff then adds that he was guilty of no fraud. I do not comprehend what fraud is, if that is not fraud. The defendants call it, on two of the occasions, an erroneous representation; and as to the over-valuation, they call it a false and erroneous representation.

It is the replications of the plaintiff which give the true colour to his own conduct, and, in my opinion, they reveal fraud. *Fraud* is not, that I am aware of, a word of art. It is a common term used to express the conduct or dealing of one who is speaking or acting in any manner (by silence it may be), to impose upon, mislead or deceive another, with intent to prejudice some one, or improperly to benefit some one. If the facts shew a fraud has been committed, I do not know why these facts will not constitute a fraud,



although they are not called a fraud. The cases of *Panama & South Pacific Telegraph Co. v. India Rubber, Gutta Percha & Telegraph Works Co.*, L. R. 10 Ch. 515, and *Begbie v. The Phosphate Sewage Co. (Limited)*, L. R. 10 Q. B. 491, state the rule and principle clearly.

There is another material point to be considered. The plaintiff says the agent of the defendants had power to bind them by the application which he accepted and sent to them, because he knew the facts which the application did not disclose, and he accepted it as sufficient and truthful, which is equivalent to an adoption of it by the defendants themselves.

The plaintiff has told us what the powers of this agent were, and they have been already stated. He had authority to make out applications, but he did not make out this one; the plaintiff says expressly he made it out himself, and he may have made it out before the agent ever saw it.

But does an agent, with all the powers before mentioned, possess the power or right to accept and bind the company by an application false to his own and the applicant's knowledge in matters material to the risk, and to be known by the defendants? I think he does not.

The powers enumerated may afford evidence from which a jury, perhaps, may or may not infer the authority to accept as binding on the company an untrue application as sufficient, knowing it to be untrue, but unquestionably they do not establish that he had such a power.

In *Gale v. Lewis*, 9 Q. B. 730, the question was, whether the policy was in the order or disposition of the person whose life was insured, and who was named in the policy as the insurer, and who became bankrupt. The action was brought by the executrix against the secretary of the insurance company. The facts were that one Densem lent money to Ware, the bankrupt and deceased, on the agreement that Ware should insure his life and assign the policy to Densem. One Loosemore, an attorney, acted as the attorney of Densem in that business, and he was also the insurance company's agent at Tiverton, where he resided,

the company's head office being at Exeter. Loosemore effected the insurance and got the policy from the company on behalf of Densem, under the agreement, and the policy never was in Ware's hands, and Ware assigned it to Densem. Loosemore's authority from the company was "in the capacity of an agent receiving instructions on behalf of the company for policies, transmitting such instructions to the office, receiving and paying over the premiums, settling accounts for losses, (on remittances from the company), keeping an account current with them, and being paid agency fees."

There was no actual notice of the assignment from Ware to Densem of the policy given to the company. But Loosemore, the agent as aforesaid, knew all the facts.

The questions left to the jury were, "If you think it was the knowledge of the office, the plaintiff is entitled to your verdict. If you think the office did not know anything of it, and do not consider what Loosemore knew as their knowledge, then, of course, the defendant is entitled to your verdict."

The Court gave a new trial because the matter was left too much at large. On the second trial the jury found, on questions left to them by the Judge, "That Loosemore did not mention the fact of the assignment at the head office at Exeter; but that the company had authorized him to receive notices of assignment for them, and had consented that notices so received by him should be equivalent to a notice served upon the company at their office."

The fact, as found by the jury, that the company had authorized Loosemore to receive such a notice, put an end to the want of notice to the company, and to the alleged want of authority of Loosemore to receive the notice. It was treated wholly as a matter of fact. It was not inferred from the specified powers of the agent, which are very similar to the alleged powers of the agent of the defendants in this action.

In the absence, then, of an express averment by the plaintiff that the defendants' agent had the power to bind

the company expressly by their policy, notwithstanding the very extraordinary misrepresentations contained in it, and matters omitted from it, although all unknown to the defendants, it cannot be held that the replications are sufficient. Such a power cannot be inferred from the enumeration of the agent's powers given in the pleadings either on principle or according to the case just referred to.

I think the weight of the American authorities to which I have referred in *Bates's* edition of the Digest of Insurance Cases, is in favour of the defendants.

It must be remembered, too, that this policy is by deed, whatever effect that may have technically in favour of the defendants as to setting up anything against it not contained in the deed.

The case of *Hendrickson v. The Queen Insurance Co.*, 30 U. C. R. 108, and in Appeal 31 U. C. R. 547, was one of agency, in which, on the facts, the company was held not bound by the notice given to the agent of a further assurance.

The case of *Wing v. Harvej*, 18 Jur. 394, 23 L. J. Ch. 511, is a very strong case against companies, holding them answerable for the acts of their agents. That was a case where payments were made by the insured on a policy on the life of another for fourteen years after that other had broken the condition of the policy by going and remaining abroad without the license of the directors of the company. These payments were made by the insured to the agent authorized to receive them, and who was all along informed by the insured that the other was abroad. And the agent always informed the insured that it would make no difference with his policy, and that it was all quite right.

Here the plaintiff has procured a policy he never should have got by his own misconduct, and which there is no reason to think he would have got if he had represented everything truly. In the case last referred to, the insured acted throughout in good faith, made all his payments punctually, and for many years, and there is no reason to believe the company would have withheld their consent if

they had in fact known everything which their agent had full notice of.

The agent here, in place of not communicating anything to the company, transmits to them a policy which he and the plaintiff knew to be false, and they must bear the consequences.

I do not pretend that I have, on this occasion, examined the numerous decisions upon this branch of insurance law. I am not sure I should be much wiser if I had done so; and I am sure I should not be more or less satisfied with the conclusion that I have come to—that the plaintiff, on these pleadings, is not entitled to recover.

In my opinion there should be judgment for the defendants on demurrer.

MORRISON, J.—I concur in the view taken by my brother Wilson. The facts, as they appear in the pleadings, amount to this: that in the plaintiff's application for insurance the plaintiff erroneously represented the distance of the premises to be insured from the wooden building to be 100 feet, while in fact it was only 58 feet, and that that fact was one material to the risk: that the plaintiff and the defendants' agent were both fully aware of the same: that the plaintiff, with such knowledge, so filled up the application; and that the agent, with the like knowledge, approved of his doing so, and transmitted the application so filled up to the defendants as the basis of the plaintiff's insurance. Can it be said that this does not shew a joint fraud on the part of the plaintiff and the defendants' agent on the latter's employers? I think so. The averment of no fraudulent misrepresentation on the part of the plaintiff does not, in my opinion, help the pleadings.

The other pleas and pleadings are, in principle, similar. So, in my opinion, our judgment should be for the defendants.

*Judgment for defendants (a).*

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(a) See also *Shannon v. Hastings Mutual Insurance Co.*, 25 C. P. 470.



SHERWOOD V. THE CORPORATION OF THE CITY OF  
HAMILTON.

*Defect in highway—Accident—Proximate cause—Liability of corporation.*

The plaintiff, with a waggon and load of bricks, was coming down a hill on the road, by the side of a precipice. He had stopped to speak to some one, when on starting again the horses ran away, and when they came to an opening in the fence or railing along the road, near the foot of the hill, they bolted through it, and down the precipice. At the trial the plaintiff was nonsuited, on the ground that the proximate cause of the accident was the horses getting beyond the plaintiff's control, not the defect in the fence.

*Held*, that the mere fact of the horses running away and becoming unmanageable would not prevent the plaintiff from recovering, unless he had been guilty of want of reasonable care or skill, which was a question for the jury; and the nonsuit therefore was set aside.

*Toms et ux. v. Corporation of Whitby*, 35 U. C. R. 226, 37 U. C. R. 100, considered—the decisions in the States of Maine, New Hampshire, and Massachussets reviewed, and the rule in New Hampshire adopted, as being in accordance with the weight of authority, and with the views expressed in that case.

The rule is, that where two causes combine to produce the injury, both in their nature proximate, the one being the defect in the highway, and the other some occurrence for which neither party is responsible, the corporation is liable, provided the injury would not have been sustained but for the defect in the highway.

DECLARATION: that the defendants are a municipal corporation: that as such they had jurisdiction within the territorial limits of the city of Hamilton: that in the city of Hamilton there is a public highway called King street: that the said highway was and still is vested in the defendants: that it was the duty of the defendants to keep the said highway in due and sufficient repair, with sufficient guards and railings to such portions thereof as were necessary for the safety and protection of persons lawfully travelling thereon; but the defendants so negligently conducted themselves in the premises, and in and about keeping the said highway in sufficient repair, with sufficient guards and railings, that the same became and was greatly out of repair, and dangerous to persons travelling on and using said highway; by means whereof, and for want of such repair, and of such sufficient guards and railings as aforesaid, the plaintiff, lawfully travelling with

his team of horses and waggon in his charge upon and along the said highway, and near to a precipice there, where such guards and railings were necessary for the reasonable safety and security of persons travelling along the said highway, was thrown and precipitated, and fell with the said team of horses and waggon from and out of the said highway, down and over the said precipice, whereby the said plaintiff and his horses were wounded and injured, &c.

Plea: not guilty. Issue.

The cause was tried at the Winter Assizes, 1875, at Hamilton, before Strong, J., and a jury.

It appeared that the accident occurred at a place called Beasley's Hollow, in June, 1874. There is a considerable hill on the road near the hollow, and near by a dangerous precipice. The plaintiff was drawing bricks into the city of Hamilton from beyond the city limits, and was going for the first load in the morning. He was going down the hill, and halted to speak to a man he met. He then started. The horses ran away; it was not shewn how far. He tried to stop them, but could not do so. They came to an opening in the fence or railing along the road, near the foot of the hill, and, in the words of the plaintiff, "darted through it." They went down the precipice. The plaintiff was thrown down on the tongue of the waggon and beneath the horses feet, and sustained the injuries in respect to which he sued. There was nothing in the road that caused the horses to run away. The plaintiff had no difficulty in keeping the horses on the line of the road till he came to the opening in the fence. They followed, as he swore, the road till "they bolted through the gap." There was a steep hill on the line of road in front of the place where the horses turned out of the road. In all probability, if it had not been for the gap in the fence the steep hill on the line of road would have stopped the horses. The fence was shewn at the place in question to be much out of repair, and to have been so for years.

Counsel for the defence moved for a nonsuit, on the

authority of *Titus v. Inhabitants of Northbridge*, 97 Mass. 258, and other cases cited in *Harrison's Mun. Man.*, 3rd ed. 406, note *p*.

The learned Judge thought the proximate cause of the accident was the horses getting beyond the plaintiff's control and not the defect in the fence, and so nonsuited the plaintiff.

During Hilary term, February 6th, 1875, *Miles O'Reilly*, Q.C., obtained a rule *nisi* calling on the defendants to shew cause why the nonsuit should not be set aside and a new trial had between the parties, on the ground of misdirection of the learned Judge at the trial, in holding that there was not sufficient evidence given to go to the jury of the defendants' liability for the negligence charged, in view of the alleged negligence of the plaintiff; and in holding that the facts appearing in evidence, claimed by the defendants to be contributory negligence on the part of the plaintiff, was contributory negligence and conclusive on the point of the defendants' liability, and relieved them from liability, whereas the plaintiff claims it should have been left to the jury to find whether or not the injury complained of really and in fact arose from the negligence of the defendants, notwithstanding the alleged negligence on the part of the plaintiff; and whereas, as it is claimed, what was so contended to be negligence of the plaintiff was not negligence, but a mere accident, occurring without any negligence on his part, and did not relieve defendants from liability for their negligence; and on the ground that the nonsuit was contrary to the evidence and to the law under the evidence.

In this term, November 26, 30, 1875, *MacKelcan* shewed cause. It is necessary for the plaintiff to shew not only negligence on the part of the defendants, but that their negligence was the sole cause of the accident, and if the ungovernable condition of the horses at the time of the accident was a contributory cause, the plaintiff could not recover.

He referred to the judgment of Mr. Justice Burton in *Toms et ux. v. Whitby*, 37 U. C. R. 100, 106; to *Titus v.*

*Inhabitants of Northbridge*, 97 Mass. 258, and other cases cited in *Harrison's Mun. Man.*, 3rd ed., 406, 407, note *p*; and also to *Toms et ux. v. Whitby*, 35 U. C. R. 195, and *Price v. The Cataraqui Bridge Co.*, Ib. 314, distinguishing these cases on the facts.

*M. O'Reilly*, Q.C., supported the rule. Negligence of both plaintiff and defendants is a question for the jury, and should not have been withdrawn from them: *Thoroughood v. Bryan*, 8 C. B. 115; *Rigby v. Hewitt*, 5 Ex. 240; *Greenland v. Chaplin*, 5 Ex. 243. But if a question for the Judge, his decision was wrong on the facts. There was no negligence nor anything culpable in the plaintiff; the sudden fright of the horses (not explainable) being an accident which all, even the most careful, are subject to. The whole reason and object of fencing dangerous places is specially to protect people against precisely such accidents; not against horses that never take fright, or harness and waggons that never break or give way. For these latter no guards are required or of any use. Therefore such an accident supervening, or preceding, or leading up to, the catastrophe, which finally results from the want of a sufficient guard, constitutes no defence to the defaulting party, bound to fence: *Palmer v. Inhabitants of Andover*, 2 Cush. 600, 608; *Hunt et ux. v. Town of Pownal*, 9 Verm. 411; *Fletcher v. The Town of Barnet*, 43 Verm. 192. Most injuries arising from negative or passive negligence are necessarily preceded by some action of the injured party, or his agent, leading up to the catastrophe, and in some sense contributing to it. In that there may or may not be negligence. If it (what precedes) be negligence which, however, does not substantially contribute to the disaster, or if it be an accident not resulting from want of reasonable care and caution, it does not disentitle the plaintiff to recover: *Palmer v. Inhabitants of Andover*, 2 Cush. 600, at p. 608; *Hunt et ux. v. Town of Pownal*, 9 Verm. 411; *Fletcher v. Town of Barnet*, 43 Verm. 192; *Tyson v. The Grand Trunk R. W. Co.*, 20 U. C. R. 256: see also *Tuff v. Warman*, 2 C. B. N. S. 740, in Ex. Ch. 5 C. B. N. S. 573;



*Bridge v. The Grand Junction R. W. Co.*, 3 M. & W. 244; *Rigby v. Hewitt*, 5 Ex. 240; *Greenland v. Chaplin*, 5 Ex. 243; in contradistinction to *Thorogood v. Bryan*, 8 C. B. 115; and *Catlin v. Hill*, *Ib.*, in which cases the negligence of the proprietors of the conveyances in which the plaintiffs were travelling, may be regarded as an accident as to the plaintiffs. See, also, *Clayards v. Dethick*, 12 Q. B. 439. This is not a case of negligence in the plaintiff of any kind, contributory or otherwise. His entire share in all that preceded the accident was simply meeting with one of those oft-occurring casualties that cannot be foreseen or guarded against. It may be admitted that, however clear the negligence of the defendant, yet if the plaintiff's negligence contributed substantially to the accident, he cannot recover. But this is not that kind of case. The distinction between them is plain and decisive. It is between negligence in a plaintiff contributing materially to the disaster, which is his own fault, and a mere accident which reasonable care and caution could not foresee, which is not his fault. It would be unreasonable, and is not law, to hold that such casualties as a team suddenly taking fright, or the like, which the obligation to fence is imposed chiefly to guard against, relieves the defaulting party from the consequences of his neglect of that obligation. If the fright of the horses, and the temporary loss of control over them, could be called negligence, which is impossible, then the jury should have been directed to find whether that contributed substantially to the accident—whether, but for that, the accident would not have happened. The opening in the fence was an ever present danger. The horses might have gone or slipped down through it on that occasion, all the same, if not frightened; and it is nearly certain that if it had not been there they could have been easily stopped in ascending the approaching hill, if not on the intervening level; and so no harm would have resulted from the fright. This is not a case of pure accident, in which the plaintiff can not recover. That means where everything on both sides is pure accident, not where there is negligence on one

side. *Toms v. Whitby*, 35 U. C. R. 195, affirmed in appeal, is a decision in point, the only difference between that case and this being that Toms' horse, while not under control, went backward against the driver's will, to and through the insufficient railing, whereas Sherwood's horses, while not under control, went forward, against the driver's will, to and through the opening in the railing.

December 23, 1875. HARRISON, C. J.—The liability of the defendants, as a municipal corporation, to be sued for damages in an action of this kind would seem, in this Province, to rest exclusively on the provisions of the Municipal Institutions' Act.

This I take to be the decision of the Court of Appeal in *Toms et ux. v. Whitby*, 37 U. C. R. 100.

It is by section 409 of the Municipal Act declared that "Every public road, street, bridge and highway shall be kept in repair by the corporation, and on default of the corporation so to keep in repair, the corporation shall, besides being subject to any punishment provided by law, be civilly responsible for all damages sustained by any person by reason of such default."

This enactment, as pointed out by Mr. Justice Patterson, in his judgment in *Toms et ux. v. Whitby*, is in effect the same as the statute law of Massachusetts, Maine, and other States of the American Union.

The Court of Appeal has, I think, in *Toms et ux. v. Whitby*, 37 U. C. R. 100, in effect decided that the obligation of a municipal corporation to keep public roads, &c., in repair, involves the obligation to do whatever is necessary to make the road fit for ordinary travel, even though it necessitate the construction of fences or other guards or barriers in dangerous places. There was unquestionably, on the authority of *Toms et ux. v. Whitby*, evidence of negligence on the part of the defendants to be submitted for the consideration of the jury. So far as the decision of *Toms et ux. v. Whitby* is applicable to the case before us, it is our duty to follow and give effect to it.

A plaintiff, in order to recover in an action of this kind, must, however, not only establish the default of the corporation, but that such default was the cause of the injury in respect of which he sues.

If it be shewn that there was contributory negligence on the plaintiff's part, directly, not remotely, contributing to the injury of which he complains, he cannot, of course, recover: *Tuff v. Warman*, 2 C. B. N. S. 740, affirmed 5 C. B. N. S. 573; *Witherley v. Regent's Canal Co.*, 12 C. B. N. S. 2; *Gee v. Metropolitan R. W. Co.*, L. R. 8 Q. B. 161; *Bradley v. Brown*, 32 U. C. R. 463.

But if it be shewn that, without fault or negligence on his part, his horses escaped from his control, and ran away or became unmanageable, so that no care could be exercised by him in respect to them, and this condition of things is not produced by a defect in the highway, the question is whether the plaintiff can recover.

This, it seems to me, is the question and the only question for our decision in this case. The Court of Appeal did not, as I understand the opinions of the learned Judges in *Toms et ux. v. Whitby*, 37 U. C. R. 100, decide the question now raised.

On the contrary Mr. Justice Burton said, at p. 107: "Assuming for the present, to the fullest extent, that the municipality are only bound to keep the road in such a state as to render it safe for travel according to the ordinary usages of travel, and that if it had been shewn that the horse had, from no fault or negligence of these defendants, taken fright, and become unmanageable, and whilst so beyond the control of the driver had come upon a defect in the highway, by which an injury had been occasioned, that the municipality would not have been liable; that is not the present case. A horse is not to be considered uncontrollable in this sense, if he merely shies or starts, or is momentarily not controlled by his driver."

The question here presented for decision is not free from conflict of opinion.

In the State of Maine, under a statute not unlike ours,

it has been in several cases held that the corporation is not liable if there be two efficient, independent proximate causes of an injury sustained by a traveller upon a highway, the primary cause being one for which the corporation is not liable, and as to which the traveller himself is in no fault, and the other being a defect in the highway. See *Moore v. Inhabitants of Abbot*, 32 Maine 46; *Farrar v. Inhabitants of Greene*, *Ib.* 574; *Coombs v. Inhabitants of Topsham*, 38 Maine 204; *Anderson v. City of Bath*, 42 Maine 346; *Moulton v. Inhabitants of Sanford*, 51 Maine 127.

In the State of New Hampshire, under a statute also like ours, the contrary is held. It is there held that where two causes combined to produce the injury, both of which were in their nature proximate, the one being the defect in the highway, and the other some occurrence for which neither party is responsible, that the corporation is liable, provided the injury would not have been sustained but for the defect in the highway. See *Winship v. Enfield*, 42 N. H. 197; *Clark v. Barrington*, 41 N. H. 44; *Tucker v. Henniker*, *Ib.* 317; *Norris v. Litchfield*, 35 N. H. 271.

In the State of Vermont, under a similar statute, the Courts appear to be in unison with the Courts in the State of New Hampshire on this question. See *Hunt v. Town of Pownal*, 9 Verm. 411; *Kelsey v. Town of Glover*, 15 Verm. 708; *Allen v. Town of Hancock*, 16 Verm. 230.

In the State of Massachusetts, under a similar statute, the decisions are apparently conflicting. In *Palmer v. Inhabitants of Andover*, 2 Cush 600, it was held that the corporation is liable for an injury occasioned by a defect in a highway, where the primary cause of the injury is pure accident; but subsequent decisions have shaken it. See *Murdock v. Inhabitants of Warwick*, 4 Gray 178; *Marble v. City of Worcester*, 4 Gray 395; and still later it has been approved: *Rowell v. City of Lowell*, 7 Gray 100.

The result of the Massachusetts decisions would appear to be to hold that if at the time the accident happened the horses were, and for some considerable time had been, out of the control of the driver, the corporation is not liable.



See *Davis v. Inhabitants of Dudley*, 4 Allen 557; *Titus v. Inhabitants of Northbridge*, 97 Mass. 258; *Horton v. Taunton*, 97 Mass. 266, note; *Fogg v. Nahant*, 98 Mass. 678, reported also in 2 *Withrow's American Cases*, 464.

In the State of Wisconsin, where a similar statute exists, the principle of the last mentioned cases appears also to prevail. See *Dreher v. Fitchburg*, 22 Wis. 675; *Houfe v. Town of Fulton*, 29 Wis. 296; S. C. 9 Am. 568.

In *Houfe v. Fulton* will be found a summary of the cases by Chief Justice Dixon, of the Supreme Court of Wisconsin. In referring to the Massachusetts cases, he says, at p. 575 of 9 Am. : "Some of these cases seem to go upon the principle that, the horses being actually uncontrollable, the plaintiff is unable to shew the exercise of ordinary care or of any care at the time of the injury in order to avoid it. Others say that the flight or unmanageableness of the horses is the misfortune of the traveller, of which he must bear the loss. A better reason would seem to be, that it is not within the spirit or intent of the statute that the towns shall be bound to provide roads that shall be safe for frightened and runaway horses—that the remedy is presumed to have been given only to those who have their horses and carriages under their control at the time. But, whatever the true ground of such decisions may be, or whether they are sound or not, it is unnecessary to enquire here, since a recognized exception to them is, that a horse is not to be considered uncontrollable that merely shies, or starts, or is momentarily not controlled by his driver."

He concludes his judgment by saying, at p. 575, that "The decided weight of authority is, that if, besides the defect in the way, there is another proximate cause of the injury, contributing directly to the result, but which cause is not attributable to the fault or negligence of the plaintiff nor of any third person, and is unconnected with the fright or unmanageableness of the team, caused as above stated, the town is liable, provided the jury shall determine that the damage would not have been sustained but for the defect in the way. Some of the reasons against the con-

clusion thus adopted are very strong, we admit,—but, on the other hand, those which favor it seem equally forcible, and in such a case we know of no better rule than to be governed by the weight of authority.”

The last United States decision on the point, that I have seen, is *Hull v. City of Kansas*, 54 Mo. 598, 14 Am. 487, decided last year. The action was to recover damages to a horse and buggy, alleged to have been occasioned by a hole in the street, negligently left uncovered. The facts appeared to be that the driver of the buggy, when attempting to turn from one street into another, got one of the lines entangled under the horse's tail, which caused the horse to commence backing, and as the driver was about to jump out the horse fell into the hole in the embankment.

The Circuit Court on the trial declared the law to be that it was the duty of the defendants to keep its streets in a proper state of repair so that they should be reasonably safe for travel, and if the defendants permitted one of its streets to be and remain so out of repair, and the plaintiff's horse and buggy were being driven along the same, and without the fault of the driver the horse and buggy of the plaintiff were injured by reason of the said street being out of repair, then the plaintiff is entitled to recover, even though such injury was the combined result of accident and of the defendants' neglect to keep the street in repair, provided the driver of the said horse was in no fault.

The Court thus adopted the view of the New Hampshire cases, and determined that although the injury was the result of accident in the temporary loss of control over the horse, yet if that accident would have resulted in no damage had the street been in proper repair, the city must be held responsible.

Mr. Justice Napton, of the Supreme Court of Missouri, in affirming the decision of the Circuit Court, said at p. 488 of 14 Am.: “The point presented by the instructions in this case, I understand, was decided at the last term at St. Joseph in the case of *Bassett v. The City of St. Joseph*, 53 Mo. 290, in which case this Court adopted the view taken by the New

Hampshire Court in *Winship v. Enfield*, 42 N. H. 202, and declined to follow the decisions in Massachusetts, referred to in the brief of the defendants' counsel. \* \* Indeed, it is not very clear that the Massachusetts cases go to the extent of holding that a mere temporary loss of control over the horse driven along the street would relieve the city from responsibility. It is held, that where the horse escapes from the driver entirely, or is totally ungovernable, or is a vicious animal, the damage occasioned is not chargeable to the city or town, because it ultimately occurs in a street, or at a place where the street is out of repair."

In the conclusion of the judgment the following language of Mr. Justice Redfield, in *Hunt v. Pownall*, 9 Verm. 111, is quoted with approbation: "In every case of damage occurring on a highway, we could suppose a state of circumstances in which the injury would not have occurred. If the team had not been too young, or restive, or too old, or too headstrong, or the harness had not been defective, or the carriage insufficient, no loss would have occurred. It is to guard against these constantly occurring accidents that towns are required to guard in building highways. The traveller is not bound to see to it that his carriage and harness are always perfect, and his team of the most manageable character and in the most perfect training, before he ventures upon a highway. If he could be always sure of all this, he would not require any further guaranty of his safety unless the roads were absolutely impassable. If the plaintiff is in the exercise of ordinary care and prudence, and the injury is attributable to the insufficiency of the road, conspiring with some accidental cause, the defendants are liable."

The Supreme Court of Missouri held that as the driver had not lost the control of the horse, except during the short period of his backing into the hole, and there was neglect on the part of the defendants, the decision of the Circuit Court should be affirmed; and this seems to me to be in accordance with the decision of our Court of Appeal in *Toms et ux. v. Whitby*, 37 U. C. R. 100.

In *Toms et ux. v. Whitby*, both in the Court of Queen's Bench, [reported 35 U. C. R. 195,] and in the Court of Appeal, I, as counsel for the defendants, endeavoured to get the Court to adopt the decisions of Maine; but, while Mr. Justice Morrison was inclined to adopt the view for which I argued, the majority of the Court was against me. Mr. Justice Wilson, after a very careful review of all the United States decisions then known, expressed the opinion that a road or bridge must be reasonably safe for the public use, and if it be not so the fact that the horse was running away or unmanageable will not prevent the person injured from recovering the damage he has sustained.

Chief Justice Richards in the same case said, in 35 U. C. R. 226: "The mere fact that the horse was restive and broke the waggon, or was for the time being not under the control of the driver, cannot relieve the defendants from their responsibility. One of the very objects of guards to a bridge is to prevent just such accidents, and when they occur and injury is sustained in consequence of the omission of the corporation to keep the bridge in a reasonably proper state of repair, I fail to see how they can free themselves from liability unless they can shew that the party complaining has been guilty of want of reasonable skill or care in driving. The mere fact that the horse shied, as it is termed, does not imply want of care or skill in driving, and it must be a fact for the jury to determine whether there was such want of care or skill."

Not one of the Judges in Appeal has in any manner dissented from the expressions of opinion as to the law thus enunciated in the Court below.

It remains to be observed that it is not shewn in this case what distance the horses ran after they started, so that I could not, if so disposed, apply the doctrine of the Massachusetts cases to the limited extent stated in *Houfe v. Town of Fulton*, 9 Am. 568, and in this view alone the nonsuit would have to be set aside. But if the law as understood and expounded in New Hampshire be the correct rule of decision, the nonsuit cannot, in any view, be upheld.



I must say, contrary to the opinion which I held when counsel in *Toms et al. v. Whitby*, 35 U. C. R. 195 that the weight of authority now appears to be in favour of the law as propounded in the New Hampshire Courts, and as this is in accordance with the opinions expressed by the majority of the Judges of this Court as constituted when *Toms et al. v. Whitby* was decided—opinions not in any manner dissented from by the Judges of the Court of Appeal—I have the less hesitation in coming to the conclusion that in this case the rule must be made absolute to set aside the nonsuit, and for a new trial without costs.

MORRISON and WILSON, JJ., concurred.

*Rule absolute without costs.*

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### McINTYRE v. McCRAKEN.

*Public company under 27-28 Vic. c. 23—Shareholder's liability.*

Certain shares in a company incorporated by Letters Patent issued under 27-28 Vic. ch. 23, were allotted by resolution of the directors among themselves at 40 per cent. discount, their then supposed value, and scrip issued for them as fully paid up. G. acquired shares under this arrangement, which he assigned to the defendant for value, representing them as being fully paid up; defendant enquired of the secretary of the company who also informed him that they were fully paid up shares, and he accepted them in good faith as such, and about a year afterwards became a director in the company. The shares appeared as fully paid up in the transfer book and other books, but the true state of the case could have been ascertained by reference to the ledger and journal.

*Held*, under an equitable plea raising the defence in equity, that defendant before purchasing had made sufficient enquiry, and that he was not liable to a creditor of the company for the amount unpaid upon the shares.

DECLARATION: for that the defendant was, at the time of the recovery of the judgment by the plaintiff against the Lake Superior Navigation Company (limited), and still is, a stockholder in the company, holding nine shares, on which there was due and unpaid the sum of \$1,800; alleging the judgment of the plaintiff to be \$826.85, on which a

writ of *fiery facias* issued to the sheriff of the county of Grey, and was returned *nulla bona*, and claiming that the defendant, as such shareholder, became liable to the plaintiff as a creditor of the company, to an amount not exceeding the amount not paid up by him on the shares held by him in the company.

Pleas—1. That defendant is not a shareholder in the company, holding nine shares as alleged.

2. That there is no sum whatever unpaid on the shares.

3. *Nul tiel record* as to the judgment.

4. Traverse of the return of the writ of execution by the sheriff.

5. That the chief place of business of the company was at the city of Toronto, and that no execution against the company had been issued to the sheriff of the county of York, (not averring that the company had any effects liable to execution in the county of York).

6. For defence on equitable grounds : that the nine shares were issued by the company as fully paid up shares to one Thomas Griffith, and thereafter the defendant, by several *mesne* assignments of the said nine shares, for a valuable consideration paid by the defendant in good faith, became the purchaser and holder of the nine shares, under the full belief that the nine shares were fully paid up, and without any notice or knowledge that the said nine shares had not been and were not fully paid up ; and the defendant accepted the same as fully paid up, and not otherwise.

The plaintiff took issue on all the pleas.

The cause was tried at the Spring Assizes for the county of York, for 1875, before Strong, J., without a jury.

It appeared that the Lake Superior Navigation Company (limited), was incorporated by letters patent, dated 5th February, 1871, issued by the Lieutenant-Governor of Ontario, under statute 27-28 Vic., ch. 23 : that the capital stock of the company was \$64,000, in shares of \$500 each : that Thomas Griffith had originally seven shares, on each of which he paid \$500 : that subsequently there was a

resolution of the directors allotting a certain number of shares, being a portion of the nominal capital of \$64,000, among themselves at 40 per cent. discount, the then supposed value of the shares : that this allotment was made on 9th March, 1872 : that Thomas Griffith acquired nine shares under this arrangement : that scrip was issued to him for these shares as fully paid up shares : that on 24th April, 1873, Thomas Griffith assigned his sixteen shares to William Griffith : that on 25th April, 1873, William Griffith assigned fifteen shares to the defendant, as a trustee for the Royal Canadian Bank : that on 30th January, 1874, he assigned the fifteen shares to himself absolutely, and that on the same day William Griffith assigned the remaining share to the defendant, making him the holder of sixteen shares in the capital stock of the company.

It was proved that when the defendant acquired the shares they were represented as fully paid up shares : that he made enquiry of the secretary of the company, and was informed that they were fully paid up shares : that in good faith they were accepted as fully paid up shares : that they appeared as fully paid up shares in the transfer book and other books of the company : that on 4th February, 1874, the defendant became a director of the company : that from the time he accepted the transfer of the shares till December, 1875, he had no knowledge to the contrary ; and that he then, for the first time, learnt of their having been issued at a discount.

The true state of affairs, however, appeared in the ledger and journal of the company, and had the defendant, before purchasing the shares, referred to these books he would have then acquired a knowledge of the facts.

The plaintiff's judgment was entered on 19th December, 1874, for \$826.85 ; costs of *fi. fa.* and sheriff's return, \$6.85, making \$833.70 ; interest from 19th December, 1874, \$18.65 ; making in all \$852.35.

The issue of the writ of *fi. fa.* to the sheriff of the county of Grey, and his return of *nulla bona*, were also proved.

It was further proved that at the time the only assets of the company were in the county of Grey, and that the company had no assets whatever in the county of York, where they carried on their business.

A nonsuit was asked on the grounds :—

1. That as defendant was not an original shareholder there was no liability.

2. That no calls were proved to have been made on the shares.

3. That the shares were issued as fully paid up shares, and were just as much paid up as if \$500 had been paid on each of them.

4. That there was no evidence of any writ of execution to the county of York.

5. That the transfers were made as transfers of fully paid up shares.

The learned Judge decided nothing but the question of *bonâ fide* purchase for value without notice, which he found for the defendant, and so entered the verdict for the defendant, reserving leave to the plaintiff to move to enter a verdict for him for \$852.35, on the law and evidence.

During Easter term, May 17, 1875, *Snelling* obtained a rule *nisi* calling on the defendant to shew cause why the verdict entered for the defendant should not be set aside, and a verdict entered for the plaintiff for \$852.35, pursuant to the leave reserved at the trial, and on the law and evidence, pursuant to the Law Reform Amendment Act.

During this term, November 29, 1875, *J. K. Kerr* shewed cause. The sixth plea was fully proved. The real question is, whether it is a good plea; and on the authority of *Waterhouse v. Jamieson*, L. R. 2 Sc. App. 29, the plea is good. There was no duty on the defendant, after the statement made by the secretary of the company, to search the ledger, journal, or other books of the company. Indeed, until he became a shareholder he had no right to do so. See also *Spargo's Case*, L. R. 8 Ch. 407, 410; *Forbes's Case*; *Dent's Case*, L. R. 8 Ch. 768; *Fothergill's Case*, Ib. 270;



*Leifchild's Case*, L. R. 1 Eq. 231; *Coates's Case*, L. R. 17 Eq. 169; *Hartley's Case*, L. R. 18 Eq. 542. The company could not recover against the defendant, and under the Act a creditor is in no better position: 27-28 Vic., ch. 23, sec. 5, sub. secs., 10, 27. A creditor is not without remedy, for the liability of the original stockholder continues till the stock is paid: See sub-sections 19, 20 of sec. 5 of the same Act. Without proof of calls there was no liability to pay in respect of the shares: See sub-sec. 10 of the same section. At all events there was no liability till the return of an execution issued to the sheriff of the county of York: See sub-sec. 27 of the same section, and *Hitchins v. The Kilkenny & Great Southern & Western R. W. Co.*, 15 C. B. 459. The Provincial Government had no power to issue the charter—the same relating to navigation,—a subject under the exclusive control of the Dominion Government: The British North America Act, 1867, sections 12, 65, 91, sub-sec. 10.

*Snelling contra.* The equitable matter stated in the sixth plea shews a right over against the transferrer, but no defence to this action: *Oakes v. Turquand*, L. R. 2 H. L. 325, 346, 351, 357, 363, 367, 376. The case of *Waterhouse v. Jamieson*, L. R. 2 Sc. App. 29, is distinguishable from the present case. See also *Murray et al. v. Bush*, L. R. 6 H. L. 37, 67, 73; *Moule v. Garrett*, L. R. 7 Ex. 101, 103. The defendant, before he became a stockholder, had the right to search the books of the company, and it was his duty to do so, and, at all events, he should have done so after he became a shareholder, and before he became a director. Whether the company could recover against the defendant is not the question, but whether a creditor, who has greater rights than the company, can do so. It was unnecessary to issue an execution to the county of York, as the evidence shewed that there were no assets except in the county of Grey, to which county the execution was sent. The Ontario Government has power to grant the charter, but whether or not, the question is not open to the defendant

on the pleadings, and, under the circumstances, is too large a question to be disposed of without notice of some kind to the opposite party.

December 23, 1875. HARRISON, C. J.—The principal question in this case is, whether a person having in good faith and for a valuable consideration, without notice, purchased shares in a joint stock company, incorporated by the Government of Ontario under 27–28 Vic., ch. 23, on the representation by the seller that they were fully paid up shares, and having, before he purchased had the representation confirmed by the proper officer of the company, can afterwards, at the instance of a creditor of the company who has discovered that in truth the shares are not fully paid up, be sued by the creditor.

This is the question, in substance if not in words, which was presented for decision in the case of *Waterhouse v. Jamieson*, L. R. 2 Sc. App. 29.

The case of *Oakes v. Turquand*, L. R. 2 H. L. 325, relied on by Mr. Snelling, was before the House of Lords when deciding *Waterhouse v. Jamieson*, for the Lord Chancellor (Hatherley), at p. 33, is reported to have said: "I think, my Lords, that the principles upon which your Lordships decided the *Overend & Gurney Case*, L. R. 2 H. L. 325, has really no bearing on the present question. Mr. Oakes had undoubtedly become a member of the company; he knew all the objects for which it was founded, and the terms of its constitution, and he entered into the ordinary engagements. Then he said: 'True it is I have entered into these engagements; but I seek to be relieved from them because I was induced to enter into them by misrepresentations, without which I should not have become a shareholder.' But this House held that whatever rights he might have acquired against those who made the fraudulent representations, he had, as regarded the outer world, executed an instrument by which every creditor had a right to believe that he was bound, and that he could not extricate himself after the winding-up,

although before the winding-up he might have instituted proceedings to liberate himself from the engagements into which he had been led by those misrepresentations. But here the only engagement Mr. Waterhouse entered into was to pay the £5 a share upon all the shares he had taken."

Lord Colonsay is reported to have said, at p. 38: "I am not surprised, however, that there was a difference of opinion upon this case in the Court below. I think some of the Judges took an erroneous view of the decision of this House in the *Overend & Gurney Case*, L. R. 2 H. L. 325, but the distinction between the two cases has been clearly pointed out by my noble and learned friend on the woolsack."

The Lord Chancellor was of opinion that the case came to this simple proposition, that you cannot fix upon a person any engagement larger or other than that on which he has entered, referring to *Ex parte Currie*, 32 L. J., Ch. 57, and held that Mr. Waterhouse was not liable to be made a contributory in respect of the amount really unpaid on the stock which he held, and which, apparently, he had never repudiated.

Lord Chelmsford, who also delivered judgment in the case, agreed, saying, among other things, at p. 37: "The appellant (Waterhouse) was no party to any misrepresentation, but purchased *bonâ fide*, under the assurance that there remained only £5 to pay on the shares, and must have regulated the price which he paid for them accordingly. If knowledge of the statement of the payment of £100 upon each of his shares being untrue would have altered his position, the liquidator does not pretend to be able to prove actual knowledge on the part of the appellant, but merely alleges 'that he knew, or ought to have known, that the nominal capital of the company was not paid up, and that the slightest enquiry would have disclosed it.' If before his purchase the appellant had looked to the documents he would have found upon the memorandum and articles of the association, and upon the register, the statutory proof that £100 had been paid on each of these shares; and if (as he was

entitled to do), he relied upon the representations of the company, he bought and accepted the transfer upon the footing that he would have no more to pay than £5 upon each of his shares, and he cannot, in my opinion, be made liable for a larger amount."

Lord Colonsay said: "I think the course to be followed is just that which my noble and learned friend on the wool sack has suggested, that we should reverse the interlocutor of the Court below," &c.

Lord Westbury, who also delivered judgment, rested his decision on a ground much more narrow and technical than that of the other law Lords, and on grounds not mentioned or expressly approved by the other law Lords.

The majority of the law Lords, in effect, decided that on the facts shewn there was an equity which afforded to the *bonâ fide* purchaser for value, without notice, a perfect defence against a creditor of the company—a defence which could not be raised by the original subscriber for stock.

In this case, I think, the defendant, before he purchased, made all the enquiry he was bound to make: that he had a perfect right to believe the statement of the accredited officer of the company: that he was under no obligation to discredit it and search the books of the company to prove its falsity; and that under the circumstances he was a *bonâ fide* purchaser for value within the rule laid down in *Waterhouse v. Jamieson*, L. R. 2 Sc. App. 29.

I do not think that the subsequent election of the defendant as one of the directors of the company makes any difference in the application of the law as laid down in *Waterhouse v. Jamieson*.

If the law had been laid down differently in that case, by an authority so high as the House of Lords, I should have been compelled to follow it, no matter how unjust the consequences.

It is the duty of a Judge to declare the law as it is, regardless of his feelings as a man; but still the Judge is none the less a man. It is pleasant for the man, if not the Judge, to feel that his decision is in accordance with the



principles of justice. It is painful for the man, if not the Judge, to feel that his decision is against the principles of justice. My decision in this case is, in accordance with the principles of justice.

This decision renders unnecessary the consideration and determination of other points raised during the argument.

I am of opinion that the rule should be discharged.

. MORRISON, J., and WILSON, J., concurred.

*Rule discharged (a).*

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### O'CONNOR AND ANOTHER V. DUNN.

*Ejectment—Claim for improvements under 36 Vic. ch. 22, O.—  
Evidence of survey.*

Where in ejectment the defendant claims a lien for lasting improvements under 36 Vic. ch. 22, O., his right thereto must be enquired into and adjudicated upon in the action. *Quære*, how such lien, if established, is to be enforced, and whether the possession can be changed until it is satisfied.

The question being as to the position of the true line between lots 3 and 4 in the first concession of the township of York: *Held*, that the field-notes of a deceased surveyor, of a survey made in 1827, were rightly rejected, it not being shewn that the survey was made for the then owners of these lots.

EJECTMENT: raising the question of the true line between lots three and four in the first concession from the bay, in York.

The plaintiffs contended that the lots from one to seven, both inclusive, should have an equal division made for each lot, because, as it was said, the original monuments are missing between the township line at the east of lot one, and the division line between lots seven and eight; in which case the plaintiffs' westerly limit for lot three would be at the distance of about 60 chains 96 links east from the town line, upon an allowance of 20 chains 32 links for each lot.

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(a) This case has been argued in the Court of Appeal, and stands for judgment there.

The defendant contended that the portion of land which the plaintiffs claimed as part of lot three, was really a part of four; and he tendered evidence as to lasting improvements which was rejected by the learned Judge. These improvements appeared to have been in the nature of grubbing, taking out stumps, underdraining, and for fruit and ornamental trees planted.

The grounds upon which this evidence was rejected, and the other facts of the case sufficiently appear from the judgment.

The cause was tried at the Winter Assizes, 1875, at Toronto, before Patterson, J., with a jury, when a verdict was rendered for the plaintiffs.

In Hilary term, February 6, 1875, *McCarthy, Q.C.*, obtained a rule *nisi* to set aside the verdict, and for a new trial, on the grounds of misdirection by the learned Judge who tried the cause in ruling:—1. That there was no evidence in proof of an original monument between lots 3 and 4, and that the entry made by the late Mr. Gibson, P. L. S., in his field notes with respect thereto, and of his having run a line in accordance therewith, was not evidence in support of defendant's contention that the existing fence was on the proper boundary between the said lots. 2. In ruling there was no evidence of an undisputed post, &c., between lots 4 and 5, and at the south-east corner of lot 6; and that the only course open to the jury was to divide between the town line and lots 7 and 8, if they were satisfied that the monument between the last mentioned lots was in the place of the original monument. 3. In holding that the defendant was not, on account of having made lasting improvements on the land in dispute under the belief that the same was his property, entitled to set up the same as a defence in an action of ejectment. 4. In holding that the defendant was not entitled to give evidence in support of such claim for improvements under 36 Vic., ch. 22, O.

In this term, November 29, 1875, *M. C. Cameron, Q. C.*, and *H. Ferguson* shewed cause. The lien for improvements is no answer to this action of ejectment.

The lien, if it exists, is not on the land but on the improvements. The evidence as to them was properly rejected, as were also Gibson's field notes, and the learned Judge's charge as to the original posts was correct.

*McCarthy*, Q. C., contra. The field notes of the deceased surveyor produced are, it is contended, evidence and should not have been rejected. As to the lien for improvements, see *Gummerson v. Bunting*, 18 Grant 516; *Kennedy v. Bowen*, 21 Grant 95; *Bell v. Walker*, 20 Grant 558. The evidence as to such improvements should have been received, and the claim for them determined.

December 23, 1875, WILSON J.—There was evidence given that as far back as 1827, Gibson, the surveyor, had discovered a post between three and four, which was 58 chains 83 links, east from the town line, or 19 chains 61 links to each lot; and also between lots four and five, which was 79 chains 8 links from the town line, allowing 19 chains 79 links to each of these four lots. The line between three and four, by an equal division from one to seven, would be 61 chains 96 links east of the town line; and according to Gibson's opinion of the posts between three and four, and four and five, the line between three and four, will be about 58 chains 83 links east of the town line.

The difference in measurement between the two modes of division would be 61 chains 96 links, less 58 chains 83 links = 3 chains, 13 links, or 1 chain 4 links difference on each lot.

What the plaintiffs actually claimed was, that lot three is too narrow, and that the defendant has encroached upon them to the extent of 1 chain 98 links in width, which makes a difference of more than four acres in the whole strip.

The learned Judge charged the jury that there was no evidence that the line claimed by the defendant was the original line between three and four, and that, therefore, the division should be made between the lots according to the whole distance from one to seven. That charge was objected to.

In my opinion, the jury should not have been so directed,

for there was evidence of the posts between three and four, and four and five, which should have been left to the jury.

In 1846, when Passmore surveyed for Brown, the very point in dispute now was in dispute then—that is, where the true position of the boundary line between three and four was ; and by the information he then got, there was a difference between two of the old witnesses, the one contending describing the limit as 1 chain 50 links apart from the site which the other assigned to it, and which is within 48 links of the quantity in dispute in this action.

The field notes of Mr. Gibson's survey in 1827 were rightly excluded, because it was not shewn the survey was made for the persons who were the owners of lots three and four at that time.

As to the exclusion of the evidence of lasting improvements made on the land, which the defendant tendered at the trial, the learned Judge excluded it because he said : "I hold the 36 Vic. ch. 22, does not give the right to retain possession, and cannot be the subject of any investigation in this suit. The lien is in the nature of the charge created by a statute of the same session in favour of mechanics, or of the charge created by a registered judgment. I am strongly inclined to the construction that the lien is not on the land but only on the improvements, which seems to me the grammatical reading of the statute ; and there are reasons which make it inconvenient to try by a jury a question such as would be raised at the same time with a question of title, as evidence proper to shew belief would not necessarily be admissible even of title, and a jury could not well discriminate between the two classes. I therefore refuse to consider the lien question at this trial, Mr. McCarthy objecting."

The statute referred to enacts that "In every case in which any person has made or may make lasting improvements on any land, under the belief that the land was his own, he or his assigns shall be entitled to a lien upon the



same to the extent of the amount by which the value of such land is enhanced by such improvement."

The lien of workmen created by the 36 Vic. ch. 27, O., for the price or value of work, materials, or machinery upon building, and upon the land occupied thereby, and usually enjoyed therewith, is secured to the person claiming a lien by means of the registration of his claim in the registry office where the property is, and by means of his registering also a certificate of *lis pendens*, which suit he must commence within ninety days after the work has been done or the materials or the machinery furnished.

The County Courts and Division Courts may deal with the claims of such persons who have liens up to a certain amount, and the Court of Chancery in all other cases beyond such amount, according to the ordinary procedure of that Court.

And the person having such lien shall be deemed a purchaser *pro tanto* within the provisions of the registry act, and the claim shall be an encumbrance against the land, and no part of the improvements made shall be removed by the owner of the land until the lien is discharged. And the estate or interest of the person in the property which is so charged, may be sold to satisfy the claim.

By the C. S. U. C. ch. 93, sec. 53, if an ejectment is brought, and by reason of an unskilful survey the defendant has improved on the claimant's land, the jury shall assess the damages to the defendant for improvements made by him before the action, and they shall also assess the value of the land to be recovered; and if a verdict be given for the claimant, he shall not be entitled to a writ of possession until he has tendered or paid the amount of the damages assessed for improvements, or has offered to release the land to the defendant, provided the defendant before the fourth day of the ensuing term pays or tenders to the claimant the value of the land assessed. And by sec. 54: If the defendant defend only for his improvements, and notify the claimant of the same, the defendant will be entitled to costs, as if the claimant had been nonsuited.

Under our statute the defendant having a lien on the land is entitled to take proceedings in equity to establish and enforce that lien, which would be given effect to in that Court by a sale of the land if necessary.

The question is, will the Court of Equity permit a claimant whose land has been benefited by lasting improvements made by the occupier of it, and who is entitled to recompense under the statute for the same, to be ejected from the land without payment of such improvements?

The case of *Rogers v. The Hull Dock Co.* 10 Jur. N. S. 1245, is not an authority for the claimant being restrained from proceeding at law under the circumstances of this case; but it has a forcible application here.

The case of *Gummerson v. Banting*, 18 Grant 516, is an express decision upon the point. The statute does not, as under the act relating to unskilful survey, stay the legal owner from disturbing the occupant until compensation has been made to him.

I do not know of any case in which the vendor, when the contract is at an end, has been prevented from ejecting the purchaser who is in possession, merely because the purchaser has made certain payments on account of the purchase money which he is entitled to get back again. I do not know of any case in which the possession is secured by the Court to the purchaser until he is repaid the money he has advanced.

I think the rule rather to be that if the purchaser terminates the contract, or when the contract is terminated, the purchaser if in possession must give it up: *Nicholson v. Wordsworth*, 2 Swanst. 365. But the case of *Gummerson v. Banting*, 18 Grant 516, before referred to may in principle go that far.

But the question is, while seized of this cause, is this Court not bound, under the late legislation, to give effect to the rights of the defendant as fully in this action as a Court of Equity might do?

I think we are, and, although it is not necessary at this moment to determine how or in what manner the lien of

the defendant, if established, is to be given effect to—whether he is entitled to remain in possession until he has been fully settled with, or whether his lien is simply to be declared, or whether when declared he is to be entitled to a decree for sale of the property to satisfy the lien, and the proceedings against him be stayed until all that is concluded, or in what other manner the statute is to be worked out—I am, nevertheless, of opinion that he is entitled to have his lien enquired into and adjudicated upon in this action. And as that has not been done, there must be a new trial.

I am not disposed to avoid the duty cast upon us of fully determining all questions, legal or equitable, which the late legislation has cast upon us. It is our duty to do it, and it is in the interest of justice we should do it.

I may say that I think it will be found the lien may be enforced, if established, by an order to sell the land affected by it, and that possibly the possession may not be allowed to be changed in the meantime.

I do not look upon the assessment of damages in such a case as one of any difficulty. It has always been done in the case of unskilful surveys; but even although it should be one of some difficulty, it must nevertheless be done.

The rule will be absolute for a new trial, in order that the whole evidence for and against the establishment of the other posts, besides the one between seven and eight, may be duly submitted to the jury, and in order that the defendant's claim for lien may be also considered and found upon. We express no opinion whether the items claimed, are, or any of them are lasting improvements.

The jury will, no doubt, under the direction of the Judge determine that matter more satisfactorily than we can.

MORRISON J. concurred.

HARRISON, C. J., was not present at the argument and

took no part in the judgment, having been engaged as counsel in the cause.

*Rule absolute without costs (a).*

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MASON, ASSIGNEE IN INSOLVENCY OF H. S. MURRAY, V.  
THE HARTFORD FIRE INSURANCE COMPANY.

*Insurance—Condition against further insurance—Power of inspector to waive.*

One of the conditions of an insurance policy provided, that if the insured had at the time of the policy, or should have afterwards, any other insurance without the consent of defendants written on the policy, the policy should be void.

The plaintiff relied upon a waiver of this condition by defendants' inspector, whose duty was described as being "to examine into the circumstances, to adjust the loss, and to settle or report to the office." A nonsuit having been ordered upon the ground that the condition could not be waived by the inspector, or in any way except in writing:

*Held*, that the nonsuit was right upon the evidence; and the Court refused to set it aside.

*Quere*, whether, if the case had been left to the jury, and they had found that the agent had authority to waive the condition, the verdict could have been allowed to stand.

**ACTION** on a policy. First count: stating an insurance with the defendants on goods, to the amount of \$2,150.

Second count, on the same policy: stating that one of the conditions was that if Murray had at the time of the policy, or should have after it was made, any other insurance without the consent of the defendants written on the policy, that the policy should be void; and that after the making of the policy, and before the loss, Murray effected another insurance, to the extent of \$2,000, with the Western Assurance Company, without the consent of the defendants written on the policy; and that after the loss the defendants had notice of such further insurance, and thereafter the defendants did, for good and sufficient consideration from the said Murray, waive the benefit of

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(a) Upon a second trial the jury again found for the plaintiffs, and the question as to the defendant's right of lien for improvements under the statute was referred to an arbitrator. A rule *nisi* to set aside the verdict has been also granted, and stands for argument.



the condition against further insurance, and their right to treat the policy as void by reason thereof, and promised Murray to pay him the sum of \$1,166.66 as and for such loss under the policy.

The common money counts were also added.

The defendants to the first count pleaded, among other pleas, a fifth plea, setting up the condition against further insurance, and the violation of it, as before mentioned, whereby the policy became void, upon which plea issue was joined.

The defendants, to the second count, by their tenth plea traversed the waiver of the benefit of the condition against further insurance, and also their promise to pay as alleged, upon which issue was joined.

The cause was tried before Burton, J., at Toronto, at the Fall Assizes of 1874, when a nonsuit was entered.

The facts sufficiently appear in the arguments and judgment.

In Michaelmas Term, December 1st, 1874, *Lash* obtained a rule calling on the defendants to shew cause why the nonsuit should not be set aside and a new trial had, because there was evidence sufficient to go to the jury to support the second and third counts; and the defendants were estopped on the evidence from denying their liability; and because it was not open to the defendants, under the pleadings, to object that the waiver relied on by the plaintiff should have been in writing endorsed on the policy.

In this term, November 24, 1875, *Bethune*, with him *F. Osler*, shewed cause. It will be contended for the plaintiff that the defendants have waived the forfeiture by going into an investigation of the loss caused by the fire. The second count, which sets up a consideration for the waiver, was not proved. There was no consideration shewn: 2 *Story's Equity Jur.*, 10th ed., by *Redfield*, 789, *et seq.* Mr. Marr, the agent of the company to enquire into the loss, had no power to bind the company by waiving this condition of forfeiture. This is not like the case of *Brady v. The Western Insurance*

Co., 17 C. P. 597, where there were special circumstances, and the agent there was the manager of the company in this province, and the waiver was only of the right of the company to plead that the action was not brought within six months after the happening of the loss. The case of the *Canada Landed Credit Co. v. Canada Agricultural Insurance Co.*, 17 Grant 418, which is against the defendants, is not approved of in *Stickney v. Niagara District Mutual Insurance Co.*, 23 C. P. 372, 382.

*Lash* supported the rule. There were five insurances on the property. Three of the insurance companies had notice of all the other insurances that were made. The defendants had notice of only two of the other three insurances. They had no notice, as the pleadings admit, of the assurance with the Western Assurance Company. The defendants have their head office in the United States. Before their agent, Mr. Marr, arrived at the place of the loss, the agents of the other companies had adjusted the loss by the mode which they considered to be the proper one to adopt. When Marr arrived he did not approve of their way of ascertaining the loss, and he suggested a different method, which the other agents followed.

By that new course the total loss was stated at	\$2,655
And the partial loss at.....	\$8,643
Of that sum the agents agreed to allow one half	4,321
Making in all .....	<u>\$6,976</u>

Which latter sum was called \$7,000, and the defendants' share of it was \$1,166.66. Murray complained of the sum which was offered to him; but he was told by Marr that he had better come to terms, as so far as the defendants were concerned they might not pay at all, as they had received no notice of the Western policy, and he at length agreed to the sum offered to him, and signed a writing at the desire of the different agents to that effect. Murray did therefore give a valuable consideration for the waiver of the condition. He claimed more than double the sum the agents of the insurance companies agreed upon as his

losses, and he gave that up after a long negotiation between the parties, and agreed to the smaller sum. The waiver is valid in law. Marr, dealing for a foreign body, was competent in adjusting the loss to waive the condition if he thought fit: *Wgld v. London, Liverpool & Globe Insurance Co.*, 21 Grant 458. The defendants do not on the record rely on the want of a writing to authenticate the waiver, but on the fact of waiver only. The fact of waiver was clearly proved: *Hotham v. East India Co.*, 1 T. R. 638. As to the want of a writing, that may be waived too, and the company may be estopped from setting up that as well as from setting up the want of notice of the further insurance.

December 23, 1875. WILSON, J.—The learned Judge nonsuited the plaintiff because “the conditions could not be waived by the inspector, or in any way except in writing.”

It was said at the trial “the duties of the inspector are to examine into the circumstances, to adjust the loss, and to settle or report to the office.”

That description of the position which Mr. Marr, the inspector of the defendants, filled in their service, and of the duties that devolved upon him, and of the powers exercisable by him as such officer, does not necessarily give him the right to waive conditions favorable to the company, unless the waiver relate distinctly to some matter in and over which he can exercise such power.

It is said the inspector is to adjust the loss—that is, to examine the books of account and vouchers, and to make all due enquiries of the insured and of his employees as to the value of the goods insured which have been destroyed or injured, to determine probably whether the goods claimed for come within the description of those insured, the extent of the loss sustained, how much is total and how much partial, the value to be set upon the different kinds of loss; and generally to do all such acts as will enable him to arrive at a fair estimate of the damage sustained.

Now, suppose there was a condition on the policy that in adjusting the loss the insured should deliver to the inspector or agent of the company engaged in the adjustment, an account or statement in writing of the various matters which the inspector should require him to furnish, and if he did not do so that the policy should be void.

I should say, without hesitation, that if an adjustment were made by the agent without a statement in writing such as the condition required being furnished by the insured, and without the agent requiring any such statement because he was willing and content to do without it, that the adjustment so made—free from fraud or collusion, of course—would be binding on the insurers, because that would be an act within the line of duty and powers of such an agent to deal with.

But when such a person assumes to dispense with conditions relating to the keeping of prohibited or highly hazardous goods, or largely in excess of the allowable quantities, or to a misdescription of the mode of heating, or the precautions required in case of steam being used, or with respect to chimneys or stove pipes, or the deposit of ashes or the proximity of dangerous places, and the like, a different question is certainly presented.

In *Gale v. Lewis*, 9 Q. B. 730, an agent of an insurance company, who receives "instructions on behalf of the company for policies, transmits such instructions to the office, receives and pays over premiums, settles accounts for losses, (on remittances from the company) keeps an account current with them, and pays agency fees," does not seem to have been considered as a person authorized to receive notice which could bind the company that an insurance effected was not for the benefit of the insured, but in fact for another, who required the insurance to be made as security for money lent to the insured, and to whom it was immediately assigned, and so that the policy was not in the order and disposition of the insured at the time of his bankruptcy, but belonged to this particular creditor.

On a second trial the jury expressly found "that the



company had authorized the agent to receive notices of assignment for them, and had consented that notice so received by him should be equivalent to a notice served upon the company at their office."

In that case the agent resided at Tiverton, the company's office was at Exeter, and they had persons acting for them in the like manner at other places.

The powers and duties of the agent in the case just mentioned made a sufficient case to go to the jury, whether he had the enlarged powers from the company to receive notice of the assignment of a policy so as to bind the company, although the company had not in fact notice of the transaction.

The case referred to was not one in which there was any such condition as in the present policy, that the consent of the company to any further assurance should be expressed by writing on the policy, otherwise the policy should be void.

The question there was simply whether the plaintiff in that action, or the assignees in bankruptcy, were entitled to the money.

I am not satisfied that an inspector of an insurance company, or such an agent as Marr is described to be, has the right or power to waive or dispense with the condition in question relating to further insurance, or with any other condition than such as may fall clearly within the power of the agent's clear and acknowledged line of duty.

Acceding to that is conceding as far as can possibly be asked by any one insured, and is conceding quite as far as the reasonable rules of insurance law can demand.

I have looked at many of the cases on this subject. I think I am conforming to the general result of them, although it must be admitted there are many strong opinions nearly, if not quite, the other way.

I should have been glad to have had the opinion of the jury whether Marr, the agent, had the power to waive such a condition. If the fact had been found for the defendants the result would have been more satisfactory; but I am

not sure whether we might not have been obliged to interfere if their finding had been for the plaintiff upon this point.

I not only cannot say the nonsuit is wrong, but I must say that, in my opinion, it is right on the evidence.

MORRISON, J., concurred.

HARRISON, C. J., took no part in the judgment, having been engaged in the case as counsel when at the bar.

*Rule discharged.*

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### MCLEOD V. AUSTIN AND BENNETT.

*Ejectment—Presumption of conveyance—Evidence of possession.*

In ejectment it appeared that the patent issued in 1823 to the plaintiff's mother, the daughter of an U. E. loyalist. She died in 1846 and her husband in 1865. Neither of them ever asserted any title, and the plaintiff never heard of the land in the family until about three years ago, when he was informed that it was his by a stranger. The defendant produced the patent, and two deeds executed by one F. in 1828 and 1829, for the north and south halves of the lot, respectively, with a series of conveyances tracing title from F. to the defendants. There was evidence that F. did the settlement duties in 1821 or 1822, and made the affidavit of their performance; and that he lived on the lot for some years, but it seemed doubtful whether in fact possession was taken by any one until one W. entered in 1838. There had, however, been undisputed possession from that time, and the taxes had been paid by the respective occupants. F.'s daughter who found the patent proved that some of F.'s papers had been destroyed by her after his death and some burned during his lifetime, though she thought no deed was among them.

The learned Judge was against the defendants on the question of possession, (forty years' possession being required) but left the case to the jury, saying that under the circumstances, he was competent for them to presume a conveyance from the patentee; and they found for defendants.

*Held*, that there was some evidence for the jury on both points, and the Court refused to interfere.

Remarks as to the doctrine of presumption in such cases, and its application under the circumstances of this country.

EJECTMENT for lot 7, in the 6th concession of Tecumseth.

The plaintiff claimed as eldest son and heir-at-law of Marjory McLeod, the grantee of the Crown.

The defendants claimed title by twenty years' possession, and each of them claimed title also, Austin to the south half of the lot, and Bennett to the north half of the lot, by

conveyance to them respectively, and they denied the title of the plaintiff.

The cause was tried at Barrie, before Burton, J., at the Spring Assizes of 1875, with a jury.

The patent to Marjory, wife of John McLeod, and daughter of Donald Cameron, a U. E. loyalist, dated 20th of May, 1823, of the land in question, was admitted.

The evidence was as follows, so far as it is material :

*Nancy McMillan* proved the marriage of John McLeod and Marjory Cameron, the father and mother of the plaintiff, and that the plaintiff was their eldest child, and that the father and mother were both dead, the mother many years ago, and the father for several years.

*Norman McLeod*, the plaintiff's brother, proved that his mother died in 1846, and his father in 1865. The family first lived in Roxborough, then moved to Finch, then to Port Credit, where his mother died, and after that his father moved to Owen Sound, where he died. He never heard this land spoken of in the family at any time till about three years ago, when the plaintiff got a letter from Donald Cameron, of Beaverton, telling him the land was his (the plaintiff's). Donald Cameron was to get 30 acres of the land if the plaintiff succeeded, and the plaintiff said he had made the deed of the 30 acres. He said he had heard of Sheriff McMartin, who lived in Cornwall, eight or ten miles from Roxborough.

The plaintiff was called, and gave evidence to the like effect.

For the defence the following documents were put in:

1. The patent. 2. Deed, 8th of June, 1828, from Benjamin Fish to Thomas Gummerson, of the south half.

3. Deed, 30th of January, 1829, from Benjamin Fish to Joseph Pearson, of the north half, and a series of conveyances from these to the defendants.

*Mary Ann Leonard* said: I am a daughter of Benjamin Fish; lived at one time in Tecumseth; he died six years ago; he was then living in Markham. After his death I searched among his papers. I destroyed a number of

papers, which I supposed of no consequence. I was breaking up housekeeping, and I wished to get rid of those which were of no use. I found the patent among them. I don't recollect any deeds but that one. I have searched since, but could find no deeds. I gave the patent to Mr. Scanlon after this action was brought. My father kept a mill at one time; don't think he kept papers there; whatever papers were there were burned. I have often heard my father and mother speak of living in Tecumseth, and my sister being born on that lot in 1822. I might have burned a deed, but I don't think I did. I never heard of my father moving back there after he left. After leaving Tecumseth he moved to Markham.

Certified copy of location ticket to Marjory McLeod, dated 21st of March, 1820, and the affidavit of performance of settlement duties, dated 6th of March, 1822, put in.

*Sarah McAdam* said: I have lived in Tecumseth since I was eleven. I am now 58. I first lived on lot 7, in the 7th concession of that township. I know this lot. I know Benjamin Fish. He was the person who first settled on it. There was no clearing but what he did. He chopped, and cleared, and fenced a portion of the lot on the north half, about 65 rods from the front of the lot; cleared about three or four acres. Part of the road was slashed. I was then between eleven and twelve. They put up the house at that time. My father made the clapboards to cover the shanty, and Fish lived there three or four years to my knowledge. Mr. Williams was the next person after Mr. Fish's family. Don't think Tyson ever lived on it. Bennett, I think, was the next. We were some time in Tecumseth before Fish came, but I was about eleven when he came. I was at a wedding of Mr. Rourke on the 8th line; my mother was there; people asked my age; my mother said I was eleven, going on twelve. The Fishes were there then. I am sure I am not mistaken. I was about nineteen when I was married. My maiden name was Nelson.

*Cross-examination.*—I was married shortly before the



Rebellion. I was thirteen or fourteen. I told you so before. The Rebellion was in '97. I was married before Daniel Williams came to live on the lot. I think the house was there when Williams lived on the lot. We had another house on the lot; I am quite sure he did not live in the house Fish built.

*Re-examination.*—I think I was married before Williams moved on to the lot. I can't remember the age of my oldest child; 28, 29, or 30 perhaps. I think he was born a year and a half after our marriage.

*James Pearson* said: My uncle once owned the half of the lot. In searching among his papers I found these tax receipts. (That is the deed of the 3rd of January, 1829, from Fish to Joseph Pearson.) The deed appears to be made at Markham.

*William Bennett*, a defendant, said: I went into possession in 1848 or 1849; have resided there ever since. Williams was there when I purchased. I saw indications of an old building on the land when I went there—the logs of an old shanty, and the stones of a fire-place.

*James Matchet* spoke also as to the indication of the old shanty on the lot about 1850.

Reply.

*Thomas Williams* said: We went to Tecumseth in 1832, lived there some time before I commenced farming. My father was in possession of the lot. I chopped on it for him. I commenced to chop in 1838. It was then a wild lot; there was no clearing that I could see on it till I did it. My father purchased from Pearson. I was all over the lot. I helped to survey it before I did anything on it. There appeared to have been settlement duties done on it. I saw no sign of a house.

*Cross-examination.*—I came to this country in 1832. My father was in the volunteers in 1837 and 1838, and when he was west in 1838 I was working on the lot. I was going on 14 when I came out. I will be 55 shortly. There was an old sugar shanty I put up about two years after I went on the lot.

*James McTaggart* said : I have lived in Tecumseth since 1823. Fish left two years before I moved in. He was on 7, in the 5th concession. I know 7 in the 6th concession ; no one was in possession of it when I went on. It was unoccupied for a long time after I moved on. There was a shanty on 7, in the 5th concession. An old man named Nelson lived on the 5th or in the 7th concession.

*Cross-examination.*—I never saw Fish. Nelson was living there before I went in.

*Re-examination.*—I think Williams went into possession in 1838 or 1839.

The learned Judge told the jury, there did not appear to him any sufficient evidence of possession, but looking to the fact that the patent was found in Fish's possession, which was consistent with his possession, and the long possession held subsequently by those claiming under him, coupled with the fact that no claim was made by the patentee, although her circumstances were such as to render it highly improbable that she would have overlooked such a claim if it really existed, it was competent to them to presume a conveyance.

The learned Judge has noted he had doubts as to the correctness of that direction, but he thought it better to give those doubts in favour of the very long possession.

The plaintiff's counsel objected to the charge in that respect. The jury found a verdict for the defendants.

In Easter Term, May 19, 1875, *Kennedy* obtained a rule, calling on the defendants to shew cause why the verdict should not be set aside, and a new trial had, on the ground of misdirection of the learned Judge who tried the cause, in directing the jury that, under the circumstances adduced they were at liberty to presume a deed from the patentee to Benjamin Fish, and in not charging the jury that there was no evidence of possession sufficient to prove title in the defendants by length of possession, and in not telling the jury that the defendants could not have obtained a title by possession against the plaintiff, inasmuch as her right to

bring an action did not accrue until the death of his father in 1865.

In this Term, December 1, 1875, *McCarthy, Q. C.*, shewed cause. There was evidence from which to presume a deed of the land from the patentee and her husband to Benjamin Fish. Fish had possession of the patent, and it was found among his papers after his death. He dealt with the land as his own, selling one half of it in 1828, and the other half of it in 1829, and there is a regular chain of conveyances from these respective deeds to the present time, under which the defendants hold. There was a fire at Fish's mill, where, if he had such a deed, it would have been destroyed. His daughter said she did not think he kept any deeds there. His daughter also said that after her father's death she burned many of his papers, and she may have burned a deed, though she did not think she had. The patentee died in 1846, her husband in 1865, and no claim was ever made for the land till about three years ago. He referred to *Tenny d. Whinnett v. Jones*, 10 Bing. 75; *Best on Presumptions*, 144-149; *Eads v. Maxwell*, 17 U. C. R. 173; *The King v. Inhabitants of Long Buckby*, 7 East 45; *Read v. Brookman*, 3 T. R. 151, 158; *Johnston v. Fergusson*, Smith & Batty, 167; *Armstrong v. Hewitt*, 4 Pri. 216; *Taylor on Ev.*, 6th ed., 142.

*Kennedy* supported the rule. Fish was shewn not to have lived on this lot, but on the next lot, and one witness said there was no clearing done on the lot before he entered on it in 1838. There was no evidence of a possession of 40 years against the patentee. The jury expressed no opinion upon it: *Taylor on Ev.*, secs. 112, 115; *Best on Ev.*, 6th ed. 508; *Duke of Somerset v. Fogwell*, 5 B. & C. 875.

There was not the least evidence that the patentee or her husband, or the plaintiff ever knew possession had been taken of the land: *Deeble v. Linehan*, 12 Ir., C. L. R. 1; *Little v. Wingfield*, 11 Ir., C. L. R. 63. Fish himself was never in possession, but to do the settlement duties before the patent issued.

The plaintiff could not sue till his father's death, in 1865. His right accrued only at that time, and he is not barred: *Doe d. Johnson v. Liversedge*, 11 M. & W. 517; *Doe d. Hammond v. Cooke*, 6 Bing. 174, 180.

December 23, 1875, WILSON, J.—The first question is, as to the possession. Was there a possession of 40 years against the patentee and those claiming under her before the 22nd of April, 1872, the day of the bringing of this action? The Consol. Stat. U. C., ch. 88, sec. 3, as amended by the 27–28 Vic., ch. 29, sec. 1, makes that the extreme limit, if there was any doubt of it before by the joint operation of secs. 3 and 46 of ch. 88. The 40 years relate back to the 22nd of April, 1832.

The evidence shews that Benjamin Fish did the settlement duties on the land in 1821 or 1822, and before March of the latter year, and that the patent issued to the plaintiff's mother on the 20th of May, 1823.

Who got the patent from the Government office was not shewn. All we know of it is, that it was found in Fish's possession after his death among his papers, and after the commencement of this suit. We know, also, that the patentee never had it, nor her husband, nor any one claiming from her, but Fish. When he got it, or from whom he got it, there is no account.

We must presume that the plaintiff's mother must have known something of the location of the lot having been made in her favour, because her son, the plaintiff, was born in 1811, and it is said she was married one year before that, and the location was made on the 21st of March, 1820, under an Order in Council of the 26th of March, 1817, in her favour.

She was, according to the evidence, in 1817, at least 25 years of age, because she was older than Mrs. McAdam, who is 80 years of age. And assuming she was 18 years of age when she was married in 1810, and her husband was probably some years older than his wife, she was therefore of an age in 1817, and her husband, when the Order in



Council was made in her favour to know of it, and to know the meaning and purpose of it. Yet, notwithstanding that, neither she nor her husband concerned themselves about the land or the right to a location, which they must have applied for, or must have known something of, from that day to the day of their deaths. Nor did any of their family know anything of it until about three years ago, when some person, who seems to have had no right to interfere, gave information to the plaintiff of his supposed rights, and stirred up this litigation.

There is evidence certainly that Fish was in possession of the land after the patent issued, if Mrs. McAdam's testimony, or memory, I should say rather, can be depended upon. According to her evidence Fish was on the land in 1827 or 1828. She says she was, at the time of the trial, over 58, so that she was born about 1817, and she was between 11 and 12 when she knew Fish was living on the land, and she mentions the fact of having seen him at a wedding at one of the neighbours' houses that took place at that time.

She said she was married before the Rebellion, which she said was in '97, meaning, no doubt, '37; and she said she was 13 or 14 when she was married. She said more than once that she was married before Williams went on to the land to clear it, and she said her eldest child might be 28, 29, or 30. Her memory was manifestly impaired, and could not be much depended upon. The son of Williams she spoke of was examined. He said his father went on the land, and he, the son, began to clear it in 1838, which was after the Rebellion; and in that respect he may be said to be corroborated by Mrs. McAdam, who said more than once that she was married before Williams went on to the land. If she were married when she was 14, she must have been married in 1831. The Williams family did not come to this country till 1832.

If I were to determine the question of possession, I should not be quite satisfied, although Fish had got the patent rightfully, that he had been on the land at any

time after its issue in 1823, nor that possession was taken by any one until Williams entered in 1838.

If Mrs. McAdam is clear she was married before the Rebellion, and before Williams went on the land, she may also be right as to Fish living on it in 1827 or 1828.

If I felt sure of that fact there would be an end of the case, for it is plain that he and those who bought from him, and who claim under him, have asserted a title to the land ever since, although there may have been a break in the actual occupation of the lot between 1828 and 1838; but non-occupation is not the equivalent of non-possession, as there may be a possession without occupation, and possession or the abandonment of possession is a fact for the jury.

The learned Judge expressed an opinion as to the possession unfavourable to the defendants, but the jury must have found that fact in their favour, and I cannot say there is no evidence to leave to them on the point.

It is now nearly 50 years since the time Mrs. McAdam speaks of Fish living on the lot, and it is difficult, after so long a time, to get convincing testimony upon such a matter respecting a wild lot of land in so newly-settled a part of the country as Tecumseth was at that time.

If the possession be not satisfactorily established, can the presumption of a conveyance be made in favour of the defendants from the patentee and her husband to Benjamin Fish? If it can, then the possession of the defendants, and those under whom they claim, has been rightful all along, and they do not need to call in aid the doctrine of prescription to defend a bad title.

Such a presumption may be made in favour of a party who has proved a right to the beneficial ownership.

As that an outstanding term in a trustee has been surrendered, so that it shall not defeat the person beneficially entitled: *Lade v. Holford*, Bull. N. P. 110. Or that the son, to whom the land was to be conveyed on his majority by the trustees of his father's will, had, within three years after he was of age, got such a deed: *England d. Syburn v. Slade*, 4 T. R. 682; *Doe d. Bowerman v. Sybourn*, 7 T. R. 2.

So the surrender of a mortgage term was presumed in favour of an elegit creditor as against the judgment debtor.

In *Doe d. Hammond v. Cooke*, 6 Bing. 174, 180, Tindal, C. J., said: "But here we are called upon to declare the presumption ought to have been made in favour of a person who has proved no right to the possession, no title, no conveyance; a person who stands upon the mere naked possession, without any evidence how or when he acquired it."

Twenty years' possession are necessary, under a feoffment, in order to raise a presumption that livery of seisin was made.

In *Doe d. Wilkins v. Cleveland*, 9 B. & C. 864, at p. 871, Littledale, J., said: "The general rule is, that unmolested enjoyment of land, or of an easement for twenty years, is *prima facie* evidence of title."

In *Doe d. Woodhouse v. Powell*, 8 Q. B. 576, at p. 582, Williams, J., said: "The presumption in such cases rests upon possession being shewn of such a nature as required, to authorize it, something like that which is presumed, whether grant, recovery, or some other step. But it rests entirely on the nature of the possession. If it be a possession such as may be otherwise accounted for, and where the possession is as likely to have taken place independently of the fact which is sought to be presumed as through it, the ground for the presumption fails."

In *Doe d. Pike v. Smith*, 3 B. & Ad. 738, the Court would not require the lessor of the plaintiff to prove that his ancestor, a tenant in tail, had not conveyed the estate so as to rebut the defendant's possession for thirty-five years. The defendant had held seven years against the plaintiff, and thirty years against his ancestor. It was shewn the ancestor had entered, and had been seised of the estate before the defendant's possession began, and the defendant did not shew an adverse possession, inasmuch as his possession was consistent with a title from the ancestor, which would be good as against the ancestor as tenant in tail for his life; and it was doubted whether the Statute of Limitations, if it had defeated the ancestor, would have defeated the heir as tenant in tail.

Mere length of time, short of the period fixed by the Statute of Limitations, and unaccompanied by any circumstances, is not of itself a sufficient ground to presume a release or extinguishment of a quit rent: *Eldridge v. Knott*, Cowp. 214.

Lord Mansfield, C. J., said, at p. 215 of that case: "There are many cases not within the statute, where, from a principle of quieting possession the Court has thought that a jury should presume anything to support a length of possession."

A possession of nearly forty years was held sufficient to warrant a presumption that the one tenant in common had ousted his co-tenant, and held adversely to him: *Doe d. Fishar v. Prosser*, Cowp. 217.

In this case the general facts from which the presumption is desired to be raised are: that the patentee and her husband must be supposed to have had a knowledge of their rights under the patent; that they never asserted a title to the land; that no one but Fish and those claiming under him are shewn ever to have had possession of the land.

Fish did the settlement duties on the land before the patent issued in 1823. Whether he was on the land after that date, and before he conveyed it away in 1828 and 1829, is not without serious doubts. He did, however, in 1828, convey one half the land to one person, and in 1829 the other half to another person.

These persons have conveyed their portions, and by sundry mesne conveyances their estate has vested in the defendants.

No one, till within the last three years, has ever asserted an adverse title to the actual occupants.

There may be said to be an undisputed possession from 1838—that is, for 35 years before the commencement of the suit—against the patentee and those claiming under her.

The taxes have been paid by the respective occupants.

What the defendants desire is, that a conveyance from the patentee and her husband may be presumed by the jury.

What is there besides the length of possession to raise



the presumption? Because that possession is just as consistent without such a presumption as with it.

The special circumstances are: That Benjamin Fish has always, so far as we know, had the possession of the patent—the evidence of title from the Crown—and he and all claiming under him have transferred the land by formal conveyances ever since 1828. Now, whether these conveyances would or would not have been made just the same, whether the presumption is raised or is not raised, may be a question. It is not so easy to account for Benjamin Fish having the unquestioned possession of the patent without some rightful delivery of it to him by some one.

He did the settlement duties on the land, and made the oath of their performance, but that could not entitle him to the patent.

The fact that the patentee and her husband never concerned themselves about the land or patent, and did not know anything of them, cannot be used to strengthen the presumption desired, as if they had, all along, had full knowledge of all these facts, and knew that Fish was claiming the land. But their indifference or ignorance of everything connected with the patent or land may be accounted for by their having parted with their rights for some very trifling amount, which was by no means uncommon in these early times, as soon as the land was located in 1817, or even before that time if the U. E. right were known to exist, as it must have been, otherwise it would not have been applied for.

It is notorious that these U. E. rights were, in former times, as marketable long before the patents issued upon them, as the lands were which were actually assured by patent.

It was then a business, the buying and selling of them, and too frequently for very inadequate prices.

The general style of conveyancing in these cases was a short assignment from the holder of the U. E. right, and a power of attorney to get out the patent, and to sell the land; and sometimes the power of attorney was the only document given and used.

Now, to rip up a claim which was really begun in 1817, when the U. E. right was recognized by an order in Council, after this lapse of time—and a claim which was valued so little at that period, and was transferred so easily and informally by the early settlers, when all persons are dead and gone who could have explained it, and a new generation has arisen, and the land is of great value, sufficient to stimulate speculators and meddlers to pry into and question a title which cannot now be explained—is a very serious matter to those persons who have bought and cultivated in good faith, and in the belief that the homes they had made were their own.

It is difficult to apply the law of presumption in such a country as this was 50 or 60 years ago with the same strictness as in an old and densely peopled a country as England. But even by that law I am disposed to think there was a case, I will not say a very strong one, but still a sufficient one for the jury to deal with, and they have done so.

I do not say I am wholly satisfied, speaking judicially, with the finding of the jury, either as to the length of possession or as to the presumption of a deed from the patentee and her husband to Fish; but I am not able to say I am wholly dissatisfied with it.

I may say I do not feel obliged to interfere with the verdict, for every one must feel that “Where a party has been in undisputed possession of property for a considerable length of time, it is harsh to deprive him of that which, however obtained, has now acquired the character of a vested interest.” *Taylor on Evidence*, sec. 67.

The plaintiff must be left to adopt whatever course he may be advised. I can only say I do not feel disposed to aid him. In my opinion the rule should be discharged.

MORRISON, J., concurred.

HARRISON, C.J., took no part in the judgment, not having been present at the argument, and having been in the case while at the bar.

*Rule discharged.*

## HAY V. GREAT WESTERN R. W. CO.

*R. W. Accident by car catching fire—Negligence—Contributory Negligence.*

The plaintiff was a passenger in defendants' train, when he heard a lamp drop in the water closet or saloon at the front end of the car, and going forward with others saw a light in the saloon and some one trying to put out the fire. The fire broke out, and he tried to pull the bell-rope, but found it would not work, and he then ran into the next car in front, the smoking-car, to pull the rope. The conductor had run forward, and the plaintiff supposing, as he said, that something had been done to stop the train, and thinking of his valise, and that there was danger of the car being burned, went back into the burning car and got it, and tried to return, but the fire broke out fiercely across the passage and prevented him. He was then driven to the rear end of the car, where the other passengers were crowding, and was seriously burned before the train stopped. The other passengers who went with him into the smoking-car remained there, and it was not burned. The defendants gave evidence to shew that the lamp was of the best construction and well secured, and that the oil was of the best kind, such as would not explode or take fire from the lamp falling. The jury having found for the plaintiff:

*Held*, that there was some evidence from which the jury might infer that the lamp was not properly secured, and that the fire was occasioned by its fall in consequence; and that the omission to have a bell-rope, as required by the statute, was negligence on defendants' part. But *Held*, also, that upon the evidence the damage to the plaintiff was caused, not by defendants' negligence, but by his own voluntary act in returning to the car. A nonsuit was therefore ordered.

ACTION for injuries to the plaintiff from a railway accident.

The action was tried at the June Assizes, 1874, at Toronto, before Patterson, J., and a special jury, and a verdict rendered for the plaintiff for \$6,000 damages.

On the trial a great deal of evidence was given, but the following are the only material portions of it:—

The plaintiff was examined, and stated that he was a passenger from London to Sarnia on the 28th February, 1874: that shortly after he left London he heard a lamp drop in the water-closet or saloon of the forward end of the passenger car, and heard smashing of glass: that he and others went to the saloon, its door being partly open, and saw a light in it of an unusual kind, and one Moncreif in the saloon trying to put out the fire: that the fire soon broke out; that he tried to pull the bell-rope, but found it did not work. He, the

plaintiff, then ran into the other forward car—the smoking-car—to try and pull the rope, but could not say how he found the rope. The conductor had run forward, and the plaintiff supposed something had been done to stop the train; that he thought of his valise, and ran or walked to his seat in the burning car to get it. He got it. That he took two rapid steps towards the forward door—through which he had just entered,—and as he did so the fire broke fiercely out across the passage with black smoke, and he could not get past it, and he then ran to the rear end of the car where the other passengers were, the train being still in motion. Shortly after, smoke and flame caught him round the neck and burnt him; he raised his collar and put his head down to protect himself, and pressed towards the end of the car, having let go his valise. The next thing he remembered, he was lying on the rear platform of the car; that he must have become insensible. He then found himself lying on the railway track; how he got there he did not know. The train was stopped at some distance from where he was. He thinks he got up himself. His head was bleeding; his left hand was burned, which gave him the most pain. He was taken to a hotel in Komoka; remained there two weeks and three days attended by doctors; and he described how he felt. He was then taken to Sarnia, being carried to the train. The first time he went out afterwards was on the 1st of May. On date of accident the plaintiff was twenty-nine years old and unmarried. After describing the wounds he received from the accident, he said he had not attempted to do any business to the time of the trial; that in attempting to make some calculation he found the blood ran to his head and he had to give up doing so; that he felt weak, and easily excited; that his respiratory organs are not so strong as before the accident.

On cross-examination, he stated that the forward car into which he went, was not burned: that he turned back for the purpose of getting his valise: that he thought from the fact that the saloon was on fire that there was danger



of the car being burned. When he returned for his valise the passengers seemed to be crowding to the rear end of the car; that when he went in the passage seemed perfectly clear, the fire not having broken out of the saloon; that when he turned to go out the flame burst across the passage; that the passengers who went into the smoking-car with him remained there.

He also gave evidence as to the extent of his injuries.

The engine-driver was examined, and said: The train was going from twenty-two to twenty-five miles an hour; that there was no bell-rope connecting the passenger car with the engine: that there were three oil tank cars on the train: that he learned of the fire by the conductor coming over the tops of the cars to him, and he stopped the train as soon as it was possible; he had not seen the fire; Rule 154 of the defendants makes it the drivers' duty to have a bell-rope attached.

*Cross-examined:* He said he did not report to the office his neglect of the non-attachment of a bell-rope to the bell: that when the bell is rung he looks out for a signal from the conductor: that there would be very little difference, in point of time in stopping, between the time it would take after the bell rung, if attached, and the time taken by a person to go forward. When the conductor came, he said: "Stop! the car is on fire, and people burning;" and he reversed at once.

*Re-examined:* There would not be two and a half minutes difference between the time if the bell was rung and if a person had to go over the train.

The sister of the plaintiff was called, who described the state of his injuries and the effect on his temperament, &c.

The brakesman was called, who stated that he tried to reach the driver to tell him of the fire. He did not think of the rule by signalling by the brakes; that he lighted the lamps; the one that fell was one that was fastened with a spring; that it was all right and secure when he left it.

The plaintiff's case being closed, defendants' counsel contended that the plaintiff failed to shew any act of

negligence that tended to the injuries ; that the omission of the bell-rope was not what led to the accident ; there is a statutable penalty as to that omission. There was no evidence that the lamp was not properly secured, but the contrary. That the plaintiff's testimony established that he was in a place of safety when he went into the second class car, and he returned to the other where the danger was.

The learned Judge overruled the objections, but reserved leave for the defendants to move.

For the defence: *Robert Green* testified to the safety of the lamp, his duty being to examine the lamps on the arrival of the trains ; that he examined those in the car in question on the day of the accident.

Another employee, whose duty was to put oil in lamps, was called, who testified as to the lamp on that day. This witness stated he never knew a lamp explode or fall out of its place.

*Col. Attwood*, a revenue officer, whose duty it is to inspect oil, stated that he examined at the inquest the oil used by the company ; that it stood the fire-test according to the Government standard ( $105^{\circ}$ ), making it impossible to generate gas that would be dangerous ; it was a safe oil to use ; this oil stood a test of  $129^{\circ}$  and  $132^{\circ}$ .

Several medical men were called on each side who gave evidence as to the extent of the injury.

*Mr. Muir*, general superintendent of the company, testified to the using of oil on other railways, and this for a long period, and never heard of the burning of a car from the breaking of a lamp. The lamp in question was a kind long in use, and considered of safe construction, and considered a safe passenger coach lamp. The oil used was the safest oil to be had, and from 10c. to 12c. a gallon dearer than the common oil, and the car was a new one.

*Cross-examined* : The oil used is better than that used in hand-lamps. Experiments were made with a lighted lamp of the kind in question, falling from a height on boards, and in no case did the lamp fall lighted to the

ground. The witness's idea of the accident was that some one had taken the bowl of the lamp out and left it on the seat, from which it fell.

The learned Judge, in his charge, was of opinion there was evidence of contributory negligence to go to the jury, in the plaintiff's returning to the burning car after having reached to the smoking-car; and he stated that he would ask the jury was it negligence to use coal-oil to light the cars, expressing his own opinion that it was not negligence, even though candles were less likely to cause such an accident. 2nd. Was the lamp of proper construction, the evidence being that it was a safe lamp for the purpose? 3rd. Was the fire caused by negligence either in securing the lamp to the wall or securing the bowl which contained the oil, or from carelessness of the brakesman who lit the lamp, or from some defect in the spring causing it to fail to keep the bowl from turning, and so allowing it to fall. 4th. That if the jury found there was no negligence in the foregoing points, but that the fire was caused by tampering with the lamp by a passenger, or from mere accident, then could the damage to the plaintiff have been avoided if the bell-rope had been attached. And the learned Judge told the jury, that the effect of the statute—Consol. Stat. C., ch. 66, sec. 171—requiring means of communication to be kept up between the conductor and the engine-driver removes all question as to its being the duty of the company to provide against accidents by having apparatus to afford such means of communication; and there having been no provision made for carrying the rope on the oil cars, and in fact no rope being attached, the question was, would the rope have enabled the conductor to have had the train stopped in time to avert the injury to the plaintiff, so that the negligence of the defendants caused the damage? 5th. As to contributory negligence: Did the plaintiff, by his own want of caution, so contribute to his own misfortune that but for his want of caution it would not have happened? The learned Judge noted he did not ask the jury to answer these questions specifically, but to find for plaintiff or defendant generally.

The defendants' counsel renewed his objections, and objected further, that on the evidence of the plaintiff and the witness Campbell, the learned Judge should have told the jury to find that there was contributory negligence.

The jury found for the plaintiff and \$6,000 damages. At the request of the defendants' counsel, the jury were asked what they found to be negligence. The jury said the want of the bell-rope and the neglect of the brakesman to signal by the brakes. The latter point the learned Judge noted he overlooked in his charge; that he should have told the jury that the company were not chargeable with negligence merely because their servant neglected to obey the rule, there being no statutable duty on the subject.

During Trinity term, August 27, 1874, *M. C. Cameron*, Q. C., obtained a rule *nisi* to set aside the verdict, and to enter a nonsuit, pursuant to leave reserved; or for a new trial, the verdict being contrary to law and evidence, and for excessive damages, and for misdirection in the learned Judge not directing the jury that the plaintiff, having got into a place of safety, voluntarily returned into the burning car, and was injured thereby; and in not telling the jury, that as to the plaintiff the not having a bell-rope attached to the car gave no cause of action.

During Easter term, June 1, 1875, *Harrison*, Q.C., and *Bethune*, shewed cause. The joining passenger cars with coal oil cars and the absence of a bell-rope were evidences of negligence. There was some evidence from the circumstances that the lamp was not properly fastened; and of all this the jury were the judges. There was no contributory negligence. The plaintiff had a right to go back for his valise; the fire had not then broken out. At all events a man is not to be judged as to what he should do in moments of extreme peril by what an ordinary man might do in his cooler moments. The damages cannot be said to be excessive, as they are not more than two or three years of the plaintiff's income.



They cited Consol. Stat. U. C., ch. 66, sec. 101; *Kearney v. London, Brighton, and South Coast R. W. Co.*, L. R. 5 Q. B. 411, in Ex. Ch., L. R. 6 Q. B. 759; *Illinois Central R. W. Co. v. Phillips*, 49 Ill., 234, S. C. in appeal, 55 Ill. 194; *Great Western R. W. Co. v. Braid*, 1 Moo. P. C. N. S. 101; *Burns v. Cork and Bandon R. W. Co.*, 13 Ir. C. L. R. 543; *Clayards v. Dethick*, 12 Q. B. 439; *Gee v. Metropolitan R. W. Co.*, L. R. 8 Q. B. 161; *Cornish v. Toronto Street R. W. Co.*, 23 C. P. 355; *Scott v. Dublin and Wicklow R. W. Co.*, 11 Ir. C. L. R. 377; *Richmond v. Sacramento Valley R. W. Co.*, 18 Cal. 351; *Mayne on Damages*, 2 ed. 457; *Smith v. Woodfine*, 1 C. B. N. S. 660; *Foy v. London, Brighton, and South Coast R. W. Co.*, 18 C. B. N. S. 225; *Fair v. London and North-Western R. W. Co.*, 21 L. T. N. S. 326; *Schmidt v. Milwaukee and St. Paul R. W. Co.*, 23 Wis. 186; *Filer v. New York Central R. W. Co.*, 49 N. Y. 47, 52; *Buel v. New York Central R. W. Co.*, 31 N. Y. 314, 318; *Keating v. New York Central R. W. Co.*, 3 Lans. N. Y. 469.

*M. C. Cameron*, Q.C., contra. There was evidence to shew that the same kind of oil had been used in the lamps for years, and that it was of the best kind. The lamp was of superior construction, and had been tried by the man who put it in place to see if it was right, and it was so. No doubt it was the wrongful act of some passenger who unfastened it and caused the accident. The omission of the bell-rope is a matter it may be for a fine, but it does not shew negligence on the part of the company. Practically the train was stopped almost as soon as if the rope had been there. The damages are excessive on the evidence as to the plaintiff's injuries, if he is entitled to recover, but he is not so entitled, by reason of his contributory negligence. His going back into the burning car when in a place of safety was not the act of a reasonable man, even in a moment of danger. No other person but the plaintiff attempted such a thing. The Courts require the greatest care on the part of passengers and others in their dealings with moving trains. See *Johnston v. Northern R. W. Co.*, 34 U. C. R. 432, and the cases there collected.

December 23, 1875, MORRISON, J.—Several questions arise on this rule. 1st. Was there any evidence of negligence on the part of the company: in other words, did the fire originate from some defect in the lamp in question or by reason of its not being perfectly secured—evidence from which the jury might infer that there was a reasonable probability that the displacement of the lamp resulted from want of care on the part of the defendants' servants, or the omission of some precaution which they ought to have taken to secure it.

Evidence on the part of the defendants was given to shew that the lamp was of the best kind; that it could be secured to prevent its falling; that it was examined that day and properly and securely fixed in its place; and that the oil used was not of a character to explode or to take fire by the lamp falling from a height. Yet still we have the fact that the lamp did fall, and that the oil did burn on the floor and set fire to the carriage, notwithstanding efforts to extinguish it. How it happened cannot be exactly ascertained or accounted for. One of the officers of the company suggested that it had been removed from its place by a passenger for some purpose and left on the seat of the saloon, and that it fell from the seat to the ground. It is only, however, a matter of conjecture, and, after reading the notes of the trial, I cannot say there was not some evidence from which the jury might infer that the lamp was not properly secured by the defendants' servants, and that through their neglect the accident of the fire happened from the lamp being thrown out of its place. It was entirely a question for the jury to determine.

The omission of having a bell-rope connecting the passenger carriages with the engine was, I think, an act of negligence. The defendants, by the 171st section of the General Railway Act, are obliged to provide and cause to be used upon passenger trains such known apparatus and arrangements as will best afford good and sufficient means of immediate communication between the conductor and engine-drivers of such trains while they are in motion.

Whether the want of a bell-rope was one of the causes which conduced to the injuries received by the plaintiff was a question for the jury, if the plaintiff did not otherwise disentitle himself from recovering compensation by some act of his own. If a bell-rope had been attached, or other arrangement for a proper communication with the engine-driver, as required by the statute, it is most probable that the high rate of speed of the train would have been checked and the extension of the fire prevented, and the passengers afforded an opportunity of escaping from the burning carriage, which they could not do with any degree of safety while the train was running at full speed; and, by reason of the omission of having a bell-rope, the engine-driver could not be signalled, and he was only notified of the fire and to stop the progress of the train after the conductor had, at great peril, passed over the tops of the intervening portions of the freight and oil tank cars of which the train was made up, and so found his way to the locomotive.

The jury, in reply to a question put to them, after they delivered their verdict, to state the negligence upon which they found their verdict, said it was the want of a bell-rope, and the neglect of the brakesman to signal the engine-driver by putting on the brakes. Now, what I take the jury to mean was, that on account of the omission of a bell-rope the engineer could not be signalled to stop the train in time to permit the passengers to escape from the burning carriage; and the same as to the neglect of the brakesman in not applying the brakes to attract the attention of the engine-driver, and in that way indicate the fact that something was wrong.

In my opinion, the finding of the jury so far was correct, but I do not think we ought to assume that these were the only grounds of negligence upon which they founded their verdict. It is not satisfactory so to take the general answer of a jury after rendering their verdict, unless they are specifically asked their finding upon all the points left to them by the Court. It is most probable that

if they were asked did they or did they not find negligence in respect of the lamp, they would have replied affirmatively.

It was further argued that the learned Judge should have told the jury that the absence of a bell-rope gave no cause of action to this plaintiff. If the ground taken in the rule was intended to be that the want of a bell-rope was not the cause of the injury to the plaintiff, but that such injury was caused by his own act, then, from the opinion I have formed upon another ground taken in the rule, I quite concur in that view.

As to the accident in a general point of view, the learned Judge very properly directed the jury that the omission of having a bell-rope was negligence in the defendants, and that the jury might infer that much of the lamentable results arising from the accident would have been avoided if a bell-rope had been attached; and as the defendants chose to trust to the running of the train without such an appliance to signal the engine-driver to stop the train, they ought to be held responsible for the reasonable consequences of such neglect.

Then, as to the principal ground taken in the rule—that of misdirection in the learned Judge, in not directing the jury that the plaintiff, having gotten into a place of safety, voluntarily returned into the burning car, and was injured thereby. The question was argued as one of contributory negligence. Strictly speaking, it was not a case of that nature, but one whether the plaintiff, through his own act, brought the misfortune upon himself, and that the injuries he suffered were not caused by the negligence of the defendants.

From the evidence, it appeared that the plaintiff having left the burning carriage in question, in which, if he had remained, there was great danger of his being burnt, had gone into another carriage free from any such danger. He voluntarily leaves the latter place of safety and ventures into the carriage on fire, for the purpose of saving a valise; and, after obtaining it, he was unfortunately prevented by



the fire and smoke from returning to his previous place of safety, and immediately thereafter received the injuries in the burning car, for which he now in this action seeks compensation. The facts are indisputable in this respect, as they were given in evidence by the plaintiff himself, and we are to say whether the defendants on this ground are entitled to our judgment.

It was contended that the accident was one peculiar in its circumstances, and so embarrassing to the plaintiff at the time, that although he ran the risk of returning into the burning carriage, and which if he had not done the injury would not have happened, he ought not to be held to come within the general principle laid down in numerous cases, that if he was the cause, or contributed to the misfortune by his own negligence, or rather, as here, by his own act, he could not recover.

I cannot assent to that view of the case. The proximate and immediate cause of the injuries was the voluntary act of the plaintiff in returning into the burning carriage from a place of safety. The injuries he received were not owing to the negligence of the defendants, and, that being the case, he was disentitled from recovering any damages.

During the argument, I was inclined to think that the plaintiff was entitled to succeed, upon the ground that he was reasonably induced to do what he did through or by the negligence of the defendants; but, upon consideration, although not free from some doubt, I cannot refer or attribute his voluntary act to any such cause. There was no preponderating or imperative necessity impelling his return into the burning carriage; it was a mere ill-judged and rash venture.

It may be said that it cannot be expected that a person placed in such circumstances as the plaintiff was, will or can act with ordinary prudence or caution, and that if he rashly does an act which causes an injury, he ought to be excused, or rather the defendants held liable, upon the ground that the injured person could not foresee or have time to reflect upon the risk and danger he was about to

incur. Although I see some force in such an argument, yet, I cannot see my way for arriving at such a conclusion; and I fear that if we were so to hold, it would give rise to a new class of cases and a system of casuistry in matters of negligence which would render it almost impossible to say where the line would be drawn.

This is not a case of embarrassment, where a party is placed in a position of impending danger, and does an act to escape from it such as leaping out of the burning carriage, and thereby suffers injury, and the question arises whether he was justified in doing the act. Here the plaintiff got into a place of safety and out of danger, and does an act which directly leads to and causes the injury, and I may here remark that it cannot be said that the plaintiff did not reflect at the time he did the act which led to the injury, as his object in returning into the burning car was the result of reflection, to save his valise.

It was further pressed that the plaintiff was justified in running the risk he did, or rather it was a reasonable act on his part to venture in the burning car, and that his doing so did not relieve the defendants from liability for the injuries he received while there; and that it was a question for the jury to say whether what he did in that respect was what a prudent man might do, and that they having found affirmatively the plaintiff was entitled to retain his verdict. For myself, I cannot see, considering the circumstances under which the plaintiff entered the burning carriage, that such a question was one properly for the jury. In my judgment, the mere statement of the facts and the proposition carries its own answer.

As said by Channell, B., in giving judgment in *Ridges v. North London R. W. Co.*, L. R. 6 Q. B., Ex. Ch., at p. 394: "I do not think that in all cases the question of contributory negligence must necessarily be left to the jury. It is true that in ordinary cases the plaintiff is not bound to negative contributory negligence, so that in such cases the defendant must prove the contributory negligence if it exists. Yet

if facts are disclosed on the plaintiff's case, the truth of which is not disputed, and which, if true, clearly shew that the plaintiff contributed to the accident, then the Judge may nonsuit; not because he can take upon himself to find the contributory negligence proved, but because, in such a case, the plaintiff fails upon an issue which lies upon him, viz., the issue whether the damage is caused by the negligence of the defendants. Of course it may usually be a proper course for the Judge to take the opinion of the jury, in order to save the expense of a second trial in case of his own opinion being overruled by the Court. In this case, however, that appears to have been done, and it is evident, from the case, the jury would have found for the plaintiff. I think, however, if they had been allowed to do so, their verdict ought to have been set aside as against the evidence, there being no evidence on which they could, properly find for the plaintiff upon whom the burden of proof lay."

In the case under judgment, the plaintiff well knew he had escaped from a place of almost inevitable danger, and had gotten into a place of safety, and he could not fail to see the obvious peril he exposed himself to by returning into the burning carriage for any purpose whatever. Yet, nevertheless, he runs the great risk and exposes himself to the danger, and unhappily gets injured. It can hardly be said that so hazardous an act was a discreet or prudent one, or that the injuries the plaintiff suffered in consequence resulted from or were caused by the negligence of the defendants. No direct authority was cited or referred to by the plaintiff bearing on a case of this kind.

It is not without some doubt that I have arrived at a conclusion unfavourable to the plaintiff, but I have done so after much consideration, and because I think there are insuperable reasons against a different conclusion. I have not overlooked the rule that the want of ordinary caution is a question of degree, and where that point is contested and arises it is one for the jury; and, as held in *Tuff v. Warman*, 5 C. B. N. S. 573, that mere want of ordinary

care and caution will not disentitle a plaintiff to recover unless it was such that but for the want of ordinary care and caution the misfortune would not have happened.

Here, as I have said, the immediate and proximate cause of the misfortune was the returning of the plaintiff into the burning carriage, and to that voluntary act of his are attributable the injuries he received. On the whole, I am of opinion that, upon this ground taken in the rule, the plaintiff is not entitled to recover, and that a nonsuit should be entered on the leave reserved.

As to the question of excessive damages, upon which this rule is also moved, assuming that the plaintiff is entitled to recover, the question depends upon the extent of the injuries the plaintiff received.

Irrespective of the external and other injuries suffered by the plaintiff, damages were claimed for an alleged permanent injury to the plaintiff's lungs, alleged to be one of the results of the accident; and the question arises whether there was evidence sufficient to establish that the plaintiff was suffering from some disease of the lungs, and that such disease was of a permanent and incurable character.

After carefully reading the evidence, it seems to me that the weight of the medical testimony is against the existence of any such disease. The plaintiff's medical testimony is not altogether satisfactory.

The learned Judge who tried the cause is far from being satisfied that there was any such permanent disease, and that in that respect the damages are greatly in excess, the jury in all probability considered that ground for damages as the most important. If my judgment turned upon this point, it would be more satisfactory that the question should be submitted to another jury.

WILSON, J., concurred.

HARRISON, C. J., having been engaged as counsel in the case, took no part in the judgment.

*Rule absolute to enter a nonsuit.*



## BAXTER V. DOMINION TELEGRAPH CO.

*Telegraph Co.—Neglect to send message—Liability—Evidence—Special conditions.*

The plaintiff sent a telegram by defendants' company from Hamilton, addressed to one H. at New York, upon one of the blank forms furnished by defendants, which he had been accustomed to use. The terms, printed on the form, on which the company received the message, were—after stating that to guard against mistakes the sender of a message should order it to be repeated, that is, telegraphed back to the originating office, for which an additional charge would be made—that the company would not be liable for mistakes or delays in the delivery of unrepeatd messages, beyond the amount received for sending them; “and the company is hereby made the agents of the sender, without liability, to forward any message over the lines of any other company when necessary to reach its destination.” The plaintiff sued defendants, alleging that the message was never received, and that by defendants' neglect to deliver it he had lost the sale of certain wheat to which it related. The defendants' line terminated at Buffalo, where such messages were transferred to the Atlantic and Pacific Telegraph Company. H. having died, his clerk was called who stated that he knew his business transactions: that this message had not been received by H., and that he enquired at the Atlantic and Pacific Telegraph Co., and was told that they had not received it either.

*Held* 1.—That the evidence was insufficient to shew the non-transmission of the message, and that some one from the office of the Atlantic and Pacific Co., or of the defendants should have been called. 2. That if this had been shewn defendants would not be liable, for the terms on which they received the message protected them; and that such terms were not unreasonable, and the plaintiff must be taken to have been aware of them.

3. *Seemle*, that the liability of telegraph companies cannot be treated as analogous to or co-extensive with that of a common carrier.

DECLARATION: The first count, after referring to 34 Vic. ch. 52, D., by which the defendants were incorporated, set out, that the plaintiff was desirous of transmitting a telegraph message to New York, as follows:—“Hamilton, June 7th, 1872. To John Hobbs, New York,—Get eighty-five store if possible but sell wheat—going away. F. Baxter.” That the defendants, in consideration of a payment of money in that behalf, &c., paid to the defendants, &c., took and accepted such dispatch, and undertook and promised the plaintiff to transmit, and to use due and proper care, &c., in the transmission of the same from Hamilton, to the said Hobbs at New York, within a reasonable time, yet the defendants have not done so.

Averment : that the defendants were not prevented doing so by any of the messages that have a preference under the 23rd section of the Act of Incorporation ; and averment of special damage in the sale of plaintiff's wheat.

The second count was for the penalty given by the 22nd section of the statute, upon which nothing turned.

The third count was : that the plaintiff, being desirous of sending from Hamilton to John Hobbs in New York, a message or dispatch, as follows :—[As before.] Which message was immediately following a printed heading, as follows : "Dominion Telegraph Company. All messages taken by this company subject to the following terms : to guard against mistakes, the sender of a message should order it to be repeated ; that is, telegraphed back to the originating office. For repeating one-half of the regular rate is charged in addition. And it is agreed between the sender of the following message and this company, that said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery of any unrepeatd message, beyond the amount received for sending the same ; nor for mistakes or delays in the transmission or delivery, or for non-delivery of any unrepeatd message, beyond the amount received for sending the same ; nor for mistakes or delays in the transmission or delivery, or for non-delivery of any repeated message, beyond two hundred times the sum received for sending the same, unless specially insured, nor in any case for delays arising from unavoidable interruptions in the working of their line, or for errors in cypher or obscure messages. And this company is hereby made the agents of the sender without liability to forward any message over the lines of any other company, when necessary to reach its destination. Correctness in the transmission of messages to any point on the lines of this company can be insured by contract in writing, stating agreed amount of risk and payment of premium thereon at the following rates, in addition to the usual charge for repeated messages, viz.: one per cent. for any distance not exceeding 1000 miles, and two per cent.

for any greater distance. No employee of the company is authorized to vary the foregoing. The company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message. J. Michie, Esq., Treasurer; J. J. McKenzie, Vice-President; John McMurrich, President:—Send the following message subject to the above conditions which are agreed to:” that the defendants promised the plaintiff that they would, upon and subject to the terms, provisions, and stipulations in that behalf contained in their statute of incorporation, as qualified by the terms, conditions, &c., in such printed heading &c., transmit such message from Hamilton to John Hobbs at New York, as an unrepeatd uninsured message within a reasonable time, &c.: that the plaintiff paid to the defendants 65 cents for the transmission of such message, &c.

Breach: that the defendants broke their promise, &c., &c., and wholly omitted and failed to transmit such message to said Hobbs within a reasonable time, &c., laying special damage in reference to sale of plaintiff's wheat.

Pleas, to first count: not guilty.

2. That defendants did not take and accept the despatch, nor promise to transmit the same, upon the terms and in the manner therein mentioned.

3. That they transmitted the despatch in the order and manner provided by the Statute of Incorporation.

7. To the third count, *non-assumpsit*.

8. That they transmitted the message, &c., within a reasonable time.

9. That defendants' line of telegraph only extended to Hamilton, to Buffalo, in the State of New York, and at Buffalo messages sent by the defendants line of telegraph were transferred to the Atlantic and Pacific Telegraph Company, to be by that company transmitted on to New York; and that they received the said message on the terms in the said agreement in the third count mentioned, and transmitted the same duly and without delay, in the order in which the same was received, to Buffalo, in the

State of New York, and then within a reasonable time transferred the same to the said Atlantic and Pacific Telegraph Company, to be by that company transmitted to Hobbs at New York.

Issue was joined on all the pleas, and there was a demurrer to the 9th plea.

The cause was tried at the Hamilton Fall Assizes, before Patterson, J.

At the trial, the plaintiff was examined, he stated that on the 7th of June, 1872, he wrote the message on one of the blank forms of the defendants which he brought with him to the office, and he also stated that he had used the blanks of defendants' company ever since the company was established, and that he had packages of them at his home, (the original message in question was produced at the trial) that he delivered it to the defendants' operator at Hamilton for transmission to New York, and paid him the usual charge, 65 cents: that finding afterwards that his wheat was not sold, he was informed, through letters with Hobbs, that the latter did not receive his telegraphic message of the 7th of June, and that he claimed an alleged loss on the sale of his wheat from the defendants: that he saw the Secretary and Vice-President of the defendants' company, who said they were sorry the message had miscarried; but that they were not responsible after the delivery of the message to the Atlantic and Pacific Telegraph company at Buffalo. It appeared also from his testimony that he had been 25 years in the grain business, and had used the telegraph lines ever since they were established; and also that he was a stockholder in the Atlantic and Pacific Telegraph Company; but he said he knew nothing of their arrangements: that he was aware his despatch could be repeated, i. e., back to Hamilton: that he did not get it repeated: that he never had any message miscarry before: that it did not occur to him to have it repeated or take any other precaution, such as insuring it, although the telegram was of great importance: that he supposed the defendants had a line by Oswego, and that from thence



they sent by American lines, and that he supposed they connected at Buffalo with the Atlantic and Pacific Telegraph Company.

The rest of the evidence for the plaintiff was taken under a commission at New York. It appeared that Hobbs, to whom the message was sent, had died. The clerk and another clerk of the deceased were examined, also the operator of the Atlantic and Pacific Telegraph Company in New York. Their evidence is referred to in the judgment.

At the close of the plaintiff's case, defendants' counsel submitted that the case failed, as the plaintiff's message was sent and given by him to defendants on the conditions set out; that there was no liability for unrepeatd messages beyond the sum paid; and that the defendants were merely the agents of the plaintiff, without liability, to forward over lines of any other company.

The plaintiff's counsel contended that the conditions respecting other lines did not apply, as only one price was paid for the transmission to New York, and that the defendants could not impose the conditions: that limited liability only applied to non-delivery through a mistake in sending a message, and because it was not shewn to be necessary to transmit the message over another line.

The learned Judge was of opinion that the evidence shewed a different contract from that alleged in the first and third counts, viz., a contract to transmit the despatch as far as defendants' line extended, and then to hand it as agent for the plaintiff, without liability, to an American line for transmission to New York, and therefore the plaintiff should be nonsuited; and that if the plaintiff was entitled to recover at all, he was clearly limited to the amount paid for the message, 65 cents; and he reserved leave to move to enter a verdict for that amount.

In Michaelmas term, November 20th, 1874, *R. Martin* obtained a rule *nisi* to set aside the nonsuit, and to enter a verdict for the plaintiff, in pursuance of the leave

reserved, or for a new trial on the ground that the nonsuit was contrary to law and evidence.

During last term, November 24, 1875, *M. C. Cameron, Q. C.*, shewed cause. The defence on which the company rely is, that by a special condition on which their contract is based they are not liable for any error or miscarriage beyond their own line, and that the error or miscarriage here arose beyond it. The demurrer, which was ordered to be argued with the rule, raises the same question. There can be no doubt that the condition is reasonable. It is analogous to railway conditions, which have time and again been held reasonable. The defendants are not in any way carriers, and are not subject to any common law liability.

*R. Martin*, with him *F. Osler*, contra. This company has no right, as the English companies have, to make conditions such as they have pretended to make. The analogy as to railways does not exist.

They referred to the following cases: *Lewis v. McKee*, 28 L. J. Ex. 62; *John v. Bacon*, 39 L. J. C. P. 365, 369; *Allday v. Great Western R. W. Co.*, 11 L. T. N. S. 267; *Denton v. Great Northern R. W. Co.*, 5 E. & B. 860; *Bristol and Exeter R. W. Co. v. Collins*, 7 H. L. 194, 197, 29 L. J. Ex. 41; *Smith v. Grand Trunk R. W. Co.*, 35 U. C. R. 547; *Czech v. General Steam Navigation Co.*, L. R. 3 C. P. 14; *Lewis v. Dudgeon*, *Ib.* 17, note (4); *Lloyd v. Iron Screw Colliery Co.*, 33 L. J. Ex. 269; *Catey v. Lawless*, 13 U. C. R. 285; *DeRulte v. New York and Albany Telegraph Co.*, 1 Daly N. Y. 547; *True v. International Telegraph Co.*, 60 Maine 9; *Western Union Telegraph Co. v. Carew*, 15 Mich. 525; *Scott and Jarnagin on Telegraphs* 149.

December 23, 1875. MORRISON, J.—I am of opinion that the defendants are entitled to our judgment. The facts material in this case are few. It appears that the plaintiff being desirous of sending a telegram to New York from Hamilton, filled up one of the blank forms

provided by the defendants' company, a form which the plaintiff brought to the defendants' office, he having, as he stated, packages of them at home—blanks which he had been in the habit of using, and frequently did use : that he, with his own hand filled it up and signed and delivered it to the defendants' operator, at their office in Hamilton, paying for its transmission 65 cents.

The message, with the printed heading to it, was as follows :—

[Here his Lordship read the telegram as above set out, and proceeded.]

That the plaintiff not hearing of the sale of his wheat, about the 17th of June, telegraphed to Hobbs that he would hold him liable for the loss he suffered by his not selling, and that Hobbs denied the receipt of the message.

The rest of the plaintiff's evidence was taken under a commission at New York. Mr. Hobbs, to whom the message was addressed, had died. A clerk of Hobbs was examined, who stated that he knew well the business transactions of Hobbs, and that between the 6th and 10th of June, only one telegram he knew of was received by Hobbs from plaintiff, viz., on the 6th of June ; and that he first heard of the missing telegram on the 18th of June : that he afterwards enquired at the office of the Atlantic and Pacific Telegraph Company if any such telegraph had been received, and was told "No"; and that he sent another clerk for the like purpose. This latter clerk was examined, who merely stated that he enquired about a telegram at the Atlantic and Pacific Telegraph Company's office at the Produce Exchange at New York ; but the witness could not say what the telegram was or in what month he enquired, or whether it was in May or July, 1872.

The telegraph operator who was in the office of the Atlantic and Pacific Telegraph Company in June, 1872, and who knew Hobbs, was examined. He stated that the company kept pressed copies of all messages received at New York ; but he stated that he did not look to see whether the telegram in question was received in New York and

knew nothing about this telegram. This witness, who had 16 years experience, and had been employed as an operator in all the principal cities of the United States, chiefly for the United States Government, explained the mode and practice of transmitting messages over connecting lines, or rather lines having their termini in the same place: that the company sending the message takes at the end of its line a press copy of the message as received, and hands the original to the other company for transmission to its destination: that in June, 1872, messages from defendants' company at Hamilton for New York were so sent or repeated from Buffalo over the Atlantic and Pacific Telegraph Company's line: that the defendants had an office in Buffalo in the same building with the Atlantic and Pacific Telegraph Company. The witness also stated, in reference to delayed and lost messages, that if the line was working between New York and Buffalo, and while messages were being sent over it, the wire dropped on the ground, to the transmitting operator the accident would not produce any material change in the strength of the circuit, and he would not know how many of his messages were received or interrupted: that eventually the company would know, but they would be temporarily lost.

Such are all the facts which appeared at the trial in reference to this message, and they only shew that the message was delivered to the defendants at Hamilton, addressed to Hobbs at New York. Hobbs is dead; when he died does not appear from the evidence. If Hobbs had lived he could have been called to say whether he received such a telegram, and if he stated that it never came to his hands, a *prima facie* case would probably have been made that the defendants neglected to transmit the message, which the defendants would have to meet; but Hobbs being dead, it was, I think, incumbent on the plaintiff to make out a like case, not by shewing by a clerk who was in the employment of the deceased, that he, the clerk, had no knowledge of the receipt of the message by Mr. Hobbs; for no matter how strong the opinion of the clerk might



be on the subject, Mr. Hobbs may have neglected to attend to the telegram, and may have concealed the facts from his confidential clerk. Some evidence should have been had from the office of the Atlantic and Pacific Telegraph Company at New York, or at Buffalo, or from the office of the defendants at the latter point, or at Hamilton.

I may here remark that it appeared by the plaintiff's testimony that he, himself, is a stockholder in the Atlantic and Pacific Telegraph Company.

The plaintiff should have given some evidence to make out a *primâ facie* case; and that the defendants failed in their duty to transmit the message at all, or if they did send it, that it was not sent within a reasonable time or not in its order. It is true the plaintiff did examine the operator at New York, but he was not asked, and for that purpose made no search, and could not say, whether any such message was ever received at New York.

It seems to me that the plaintiff studiously avoided calling any witness who could throw any light on the want of duty on the part of the defendants which he now complains of. It therefore appears to me that, independent of the special contract and conditions upon which the message was delivered to and received by the defendants, the plaintiff failed to make out a case.

It would be most unreasonable, I think, to hold that the mere delivering of a message, without some proof that the defendants omitted to transmit it, rendered them liable in an action like this.

Assuming, however, that there was evidence to support an action, we have to look to the contract and conditions upon which the message was delivered to and received by the defendants. The plaintiff is a person from long experience, as appears by his testimony, intimately acquainted with the sending of telegraphic messages, and the conditions upon which the company received and sent them, and that messages sent by them to New York from Hamilton had to pass over the line or lines of other companies to reach its destination.

Now, it is quite clear that the contract and one of the conditions upon which the defendants received this message for transmission over their line was, that in respect of the transmission of the message over the line of another company when necessary to reach its destination, such as in this instance, the defendants stipulated for that purpose they were only the agents of the plaintiff, without liability, in transmitting the message beyond their line—in other words, that they did not undertake or contract to send the message to New York, but only to send it over their line, and to hand or deliver the message when received at Buffalo, the point where the defendants' line ended, to the other companies' line for transmission to its destination.

Now, the contract set out in the 1st and 3rd counts of the declaration are as pleaded essentially different, and not supported by the evidence.

We were referred by Mr. Martin to the statute by which the defendants are incorporated, 34 Vic. ch. 52 D., in support of the plaintiff's case. I find nothing in that statute in any way affecting the contracts of the company, nor anything in the statute to prevent or restrict the defendants making or entering into any agreement with parties using their line. The only duty which the statute imposes is that mentioned in the 22nd section, that they shall transmit all despatches in the order in which they receive them, under a penalty of \$100.

The contract is, therefore, not opposed to any statutory provision, and is certainly not against any rule of common law.

Mr. Martin also pressed the unreasonableness of the conditions, and that it was for the jury to say whether the plaintiff was aware of them and that we ought to assume he was ignorant of them. The evidence clearly negatives any such ignorance, or that the plaintiff was in any way deceived.

As said by Bramwell, B., in *Lewis v. Great Western R. W. Co.*, 5 H. & N. 867, at p. 874: "It would be absurd to say that this document, which is partly in writing and partly

in print, and which was filled up, signed and made sensible by the plaintiff, was not binding upon him. A person who signs a paper like this must know that he signs it for some purpose, and when he gives it to the company must understand that it is to regulate the rights which it explains. I do not say there may not be cases where a person may sign a paper and yet be at liberty to say: 'I did not mean to be bound by this,' as if the party signing were blind, and he was not informed of its contents. But where the party does not pretend that he was not deceived, he should never be allowed to set up such a defence."

As to the question of the unreasonableness of the conditions, if that be one open for argument, when we consider the means and appliances upon which a telegraph company depends for the working and operating of its line—the liability at any moment of their own and other connecting lines being interrupted and rendered useless by sudden electrical and terrestrial disturbances and accidents, the influence of which may not be felt at the transmitting office, and which cannot be provided against, and over which the company has no control—one can readily see the reasonable necessity of permitting such companies to make contracts and exact conditions limiting their liability particularly stipulating for non-liability as to the working of lines other than their own. These defendants point out and give the sender of a message the means and opportunity, by paying an additional sum, to have the message repeated back from its destination to the originating office, and so ascertaining to a certainty whether the message reached its destination; and one would suppose that business men sending important messages, such as the one in this case, would adopt such means. If, however, the sender chooses to take the risk of the less expensive mode of sending his message, and from any cause it miscarries, he has himself to blame.

In the case of *MacAndrew v. The Electric Telegraph Co.*, 17 C. B. 3, where through a mistake in the telegram a ship was ordered to Southampton instead of Hull, whereby the

plaintiff lost the sale of a cargo of oranges, on the back of the message was endorsed conditions very similar to those in this case. There the plaintiff was, contending they were unreasonable under the defendants' Act of Incorporation, which provided that their rights and privileges were "subject also to such reasonable regulations as may be from time to time made or entered into by the company." No such provision is in the Act incorporating these defendants. The condition complained of there was, viz.: "The company will not be responsible for mistakes in the transmission of unrepeatd messages, from whatsoever cause they may arise."

Jervis, C. J., in giving judgment, said, at p. 14: "So far from that being, as my brother Byles suggests, an unreasonable qualification or limitation of the company's liability, it seems to me to be perfectly just and reasonable that means should be afforded to the company of ascertaining by repetition the correctness of the translation of the messages delivered to them for transmission."

Willes, J., said, at p. 16: "It seems to me to be immaterial to consider whether or not the word 'regulations' in the 66th section \* \* were intended to include such a condition as this in the contracts between the company and those for whom they may transmit messages; because supposing it does, it would be reasonable for the company to do what a party, if he had the sending of a message for himself by the telegraph, would have done, and to charge for it. For instance, if a man wanted to send a message by the telegraph which was important to him should be correctly transmitted, he would naturally repeat it, in order to insure its correctness." Again, p. 17: "If such a limitation as this might have been imposed upon the contract by the common law, it seems to me to be clear that there is nothing in the statute to prevent the company from so limiting the contracts between themselves and the parties who employ them."

We were referred to several cases in the American Courts by Mr. Osler. Upon an examination of these



authorities, it seems to me they strongly support the defendants' contention. And it was also argued that these defendants were similar to common carriers, and that the rules of law applicable to the latter ought to apply to them.

I cannot concur in that view to the full extent. There are only a few cases to be found in the English Courts.

I notice in *Playford v. The United Kingdom Telegraph Co. Limited*, L. R. 4 Q. B. 706, that Lush, J., said, at p. 714: "We cannot agree with the judgments given in the American Courts in the cases cited in the argument, that there is any analogy between a consignment of goods through a carrier and the transmission of a telegram."

I find, however, that the late American decisions take a different view. In *Breese v. United States Telegraph Co.*, 45 Barb. 274, the learned Judge who delivered the judgment of the Court, says, at p. 292: "I cannot refrain from observing here, that the business in which the defendants are engaged, of transmitting ideas from one point to another, by means of electricity operating upon an extended insulated wire, and giving them expression at the remote point of delivery, by certain mechanical sounds, or by marks, or signs indented, which represent words or single letters of the alphabet, is so radically and essentially different, not only in its nature and character, but in all its methods, and agencies, from the business of transporting merchandise and material substances from place to place by common carriers, that the peculiar and stringent rules by which the latter is controlled and regulated, can have very little just and proper application to the former. And all attempts heretofore made by Courts to subject the two kinds of business to the same legal rules and liabilities will, in my judgment, sooner or later, have to be abandoned, as clumsy and indiscriminating efforts and contrivances to assimilate things which have no natural relation or affinity whatever, and at best but a loose or mere fanciful resemblance."

In the *Western Telegraph Co. v. Carew*, a case in error in the Supreme Court, 15 Mich. 525, we find the point

decided. It was there contended that the company were liable as common carriers. The Court said, at p. 532: "We are all agreed that Telegraph Companies, in the absence of provision of statute imposing such liabilities, are not any common carriers, and that their obligations and liabilities are not to be measured by the same rules: that they do not become insurers against all errors in the transmission and delivery of messages."

In that case the conditions were similar to those of these defendants; but they were printed on the back of the blank form; on the front were the word "see conditions on back." There the Court below ruled "That the plaintiff was not bound by the conditions \* \* unless his attention was drawn to them;" and also that it was "immaterial on what line the error occurred; the defendants having received payment for the proper transmission from Detroit to Baltimore."

The Court said, at p. 536: "This printed matter on the face of the paper could hardly escape the attention of any one not naturally or purposely blind, who should write a message on the paper. He must at least know that it was placed there for some purpose connected with the message. It is therefore no excuse for him to say that he did not read the printed matter before his eyes. It was gross carelessness on his part if he did not."

The Court, referring to the cases of *Lewis v. Great Western R. W. Co.*, 5 H. & N. 867, and *MacAndrew v. The Telegraph Co.*, 17 C. B. 3, both above cited, in the judgment further said at p. 536: "The conditions on the back of the message \* \* did not state where the line of the company terminated, nor what other line the message must pass over. But the reference to the terms of sending over other lines, was sufficient, if the plaintiff deemed it of any importance to him, to put him upon enquiry, when the fact would at once have been ascertained."

The numerous cases bearing more or less on the question involved, which Mr. Martin, with his usual industry, brought under our notice, are upon examination quite distinguishable from the case under judgment.

On the whole, I am of opinion that the rule should be discharged.

The demurrer to the ninth plea, which was argued at the same time, raises the same points, and our judgment will be also for the defendants.

WILSON, J., concurred.

HARRISON, J., took no part in the judgment, having been engaged as counsel while at the bar.

*Rule discharged. Judgment for defendants on demurrer.*

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# HOWELL V. DOMINION OF CANADA OILS REFINERY CO. LIMITED.

*Imperial Joint Stock Company's Acts—Action against company here—  
Set-off—Staying proceedings.*

To an action by the plaintiff for salary against a company incorporated under the Imperial Joint Stock Companies Acts, the defendant pleaded a set-off. It appeared that the plaintiff and one H. held shares which had been issued as paid up, but that that fact not having been registered as required by the statute, they had been placed on the list of contributories under the Winding-Up Acts in England, as liable for the debts of the company to the extent of their shares. The plaintiff also held similar shares in his own name.

*Held*, that under a special equitable plea the defendants might set off the alleged unpaid shares held by the plaintiff, but not those held by the plaintiff and H.; and that their proper remedy, therefore, was to apply to stay the action under the equity of the Imperial Acts, which application might be made to this Court.

*Semble*, that the action should be stayed, and all matters concerning the company left to be dealt with under the Winding-Up Acts in England.

**ACTION** for wages and salary.

Among other pleas, the defendants pleaded a set-off equal in amount to the plaintiff's claim.

The cause was tried before Strong, J., at the Toronto Spring Assizes, 1875.

The learned Judge held the plaintiff's case proved, and that there was no evidence to support any of the defences pleaded, and he directed the jury accordingly. A verdict

was found for the plaintiff, and damages assessed at \$5,844; the defendants having leave to move to enter a verdict in their favour on the issue on the seventh plea.

The defendants put in evidence the depositions taken under a commission in this cause in England.

That evidence shewed that the plaintiff and one Houghton held 1,500 shares of the defendants' stock at £5 sterling per share, which had been issued as paid up stock; but, because of the want of registration of that fact under the Imperial Act, 30 & 31 Vic., ch. 131, "The Companies' Act 1867," sec. 25, the holders of these shares not having in fact paid them were not entitled to be treated as shareholders who had paid up; but, that they had been placed on the list of contributories, under the Winding-up Companies, Acts in England, as persons who were liable for the debts of the company to the extent of their shares. And, also, that the plaintiff held in his own name fifty shares in the company to the extent of £250 sterling, issued as paid up shares, but which were not paid for, and that he had also been upon the list of contributories in respect of such last mentioned shares also.

The defendant's company was incorporated under the Imperial Act 25 & 26 Vic. ch. 89, "The Companies Act, 1862."

In Easter Term last, May 21, 1875, *J. K. Kerr* obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside, and a verdict entered for the defendants on the issue on the seventh plea, pursuant to leave reserved, and on the law and evidence; and on the ground that the verdict is against the weight of evidence, and also why all amendments should not be made in the pleadings as might appear to be necessary and proper.

In this term, December 1, 1875, *F. Osler*, shewed cause. The shares in question having been issued by the company to the plaintiff as paid up shares, in pursuance of the agreement between them, by which the 1,500 shares were to be accepted by the plaintiff and Houghton as so much of the purchase money of the property and patent rights which



they had then sold to the company, are in fact paid up as between them and the company. A full consideration was given by these persons to the company for the shares, and it is only by the non-registration of that agreement that the shares are now claimed to be treated as unpaid shares. As the company are bound to allow their shares as fully paid, that is a sufficient answer to the set-off which the company claims. If the plaintiff's claim were before the Winding-up Court, the unpaid shares, if they are so, might be set off, because the liquidator and creditors would be parties to that suit with the plaintiff; but the liquidator and creditors are not parties to this suit. He referred to *Henderson v. Peruvian R. W. Co., Limited*, 16 L. T. N. S. 297; *Ex parte Strang*, L. R. 5 Ch. 492; Imperial Act, 25 & 26, ch. 89; *Cox on Joint Stock Companies*, 173, 211, 212; *Barned's Lanking Co. v. Reynolds*, 36 U. C. R. 256; *Princess of Reuss v. Bos et al.* L. R. 5 H. L. 176, 185.

*J. K. Kerr* supported the rule. By reason of the Winding-Up Acts, there is a liability created of the plaintiff to the defendants for the creditors of the company to the amount of these unpaid shares. In *Barned's Banking Co. v. Reynolds*, 36 U. C. R. 256, before referred to, it was held that the company might, in its own name, bring an action against a shareholder for the amount of his winding-up liability to the creditors of the company. The company in this action must therefore be equally entitled to plead the set-off of the unpaid shares against the plaintiff's demand. If the ordinary plea of set-off now pleaded should not be sufficient to let in the special set-off, leave has been asked to amend the plea, so as to cover the demand.

He referred to *Re Overend, Gurney & Co., Grissell's Case*, L. R. 1 Ch. 528; *Brighton Arcade Co., Limited, v. Dowling*, L. R. 3 C. P. 175, 182; *Re Agra & Masterman's Bank, Anderson's Case*, L. R. 3 Eq. 337; *Re Stranton Iron and Steel Co., Barnett's Case*, L. R. 19 Eq. 449; *Sankey Brook Coal Co., Limited, v. Marsh*, L. R. 6 Ex. 185; *Ellis v. McHenry*, L. R. 6 C. P. 228.

The Imperial statutes as to winding-up companies extend to the colonies. The sections applicable to this case are 25 & 26 Vic. ch. 89, secs. 87, 88, 89, 90; 30 & 31 Vic. ch. 131, secs. 25, and several following sections, and sec. 40.

December 23, 1875. WILSON, J.—The case of *Princess of Reuss v. Bos et al.*, 5 L. R. H. L. 176, shews that the defendants' company, which was incorporated under the Imperial Joint Stock Companies Acts, may be wound up in England, although the property bought and the business to be carried on is in a foreign country. The evidence shews that the principal and head office of the company is in London, England; that the directors and most of the shareholders reside there, and that the funds were raised there for the purposes of the company. That case was cited, for the arguments of counsel at pp. 185, 186, that effect would be given in foreign countries to the winding-up proceedings carried on in England. That was the decision in *Barned's Banking Co. v. Reynolds*, before mentioned, which is not yet reported (a).

As the company may sue for calls or unpaid stock, it may equally set them off.

The following cases may not be referred to in that judgment: *Higgs v. The Northern Assam Tea Co., Limited*, L. R. 4 Ex. 387; *Ex parte Universal Life Assurance Co.*, L. R. 10 Eq. 458, and *Sankey Brook Coal Co. Limited v. Marsh*, L. R. 6 Ex. 185.

I do not object to the general form of the plea of set-off, as the defendants are at liberty to adapt it to the special subject of the set-off if they desire to do so. The present form will certainly not answer. The set-off should as a rule be expressed in like manner as the claim, if sued for, would be expressed in the declaration.

That amendment will enable the company to set off the alleged unpaid shares which are held by the plaintiff in his individual right, if they are able, as I presume they

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(a) Now reported 36 U. C. R. 256.

are, by an equitable plea, to treat them as unpaid shares. But can the set-off be made to apply to a claim due by the plaintiff and another person to the defendants? Demands which are not due by and to the same persons who are the parties to the suit cannot be set off, and the rule in that respect is the same in winding-up proceedings: *Imperial Mercantile Credit Association, Limited*, 16 L. T. N. S. 314—as it is in other proceedings at law and in equity.

It appears to me that the defendants' only remedy must be not by pleading, excepting as to the fifty shares held by the plaintiff personally; but by applying, if they think they can sustain their application, to stay this action under the equity of the Imperial Acts.

If this action were pending in England, the Court of Chancery, before the late Judicature Act, would have stayed the action under the Act of 1862, secs 85 and 87.

Since the Judicature Act, the Common Pleas Division, in which an action was brought against a company in course of winding-up, thought the application should be made to the Court where the winding-up proceedings were being carried on: *Kingchurch v. Peoples' Garden Co.*, W. N., 20 Nov., 1875, p. 198.

The Master of the Rolls thought the application should be to the Court where the action to be stayed was pending: *In re Peoples Garden Co.*, W. N., 20 Nov. 1875, p. 193.

And the Court of Queen's Bench, acting upon the opinion of the Master of the Rolls, stayed the action which was brought in its Court: *Walker v. Banagher Distillery Co.*, W. N. 27 Nov., 1875, p. 215.

Under the equitable power we now possess, I assume we may entertain such an application and give effect to it, if it be found the Court of Chancery could do so in this Province.

And I do not know why, if it is our duty to recognize these winding-up proceedings in actions which are brought here in respect of them, we should not equally give effect to all the other provisions of the Act necessary to enable the proper results of that proceeding to be duly worked

out, according to the powers legal or equitable with which we are invested.

These results cannot be worked out by permitting this action to be carried on. The parties in this suit are now before the proper Court in England, to deal with any matter concerning the company, and including of course the subjects of this action; and that Court has by its officer the possession and custody of all the property and effects of the company, to distribute justly among the creditors and shareholders according to the special provisions in such a case.

The Courts here should, as fully as they can, aid in such a case. We are not deciding now what our powers are, or what we shall or may do. The parties have not considered nor discussed this matter, and as yet no such application has been made to stay the suit.

At present, therefore, we shall give no final judgment, but we shall stay proceedings till the fifth day of next term, to enable the defendants to apply in such manner and to such Court, and for the purpose suggested, as they may think proper if they shall be so advised.

MORRISON, J., concurred.

HARRISON, C. J., took no part in the judgment, having been engaged in the case while at the bar.

*Rule accordingly.*



## AITCHESON V. COOK.

*Agreement—Condition precedent—Waiver—Amendment.*

The defendant agreed in writing to buy from the plaintiff certain quantities of different kinds of lumber specified, "culls all out, and all good merchantable lumber by G. F. or J. Sills's inspection."

The plaintiff sued upon this agreement, alleging that all things were done, &c., necessary to entitle him to have the lumber accepted, yet that defendant, having accepted part, refused to accept the residue. It appeared that part of the lumber had been shipped by defendant's orders to one P. at Buffalo, and there was evidence of a new agreement as to the inspection, but no inspection had been made. It was also proved, without objection, that according to the usage in such cases it is the purchaser's duty to procure the inspector. At the trial, the case being taken in defendant's absence, it was held that defendant was bound to procure inspection, and that the declaration should have been for not doing so; and as an amendment was not accepted on the terms imposed, a verdict was entered for defendant.

*Held*, that under the contract the inspection by G. F. or J. Sills was a condition precedent to defendant's obligation to accept the lumber; but that defendant might waive this condition or agree to a different inspector. The Court however refused to amend and enter a verdict for the plaintiff; but granted a new trial on payment of costs, to enable the plaintiff to amend, and to have the question as to such alleged waiver and substitution properly tried.

**DECLARATION:** First count, on an agreement for the purchase by the defendant of a quantity of cherry and butternut lumber, beech lumber, birch lumber, soft and hard maple lumber, black and white ash, basswood lumber, oak lumber; all except the oak to be sawed one inch thick, from six to twenty inches wide, to average thirteen inches wide, not under twelve, nor over sixteen feet long, all culls to be taken out, and all to be good merchantable lumber, to be cut two, three, or four inches thick, from ten to eighteen inches wide, to average fourteen inches, and from twelve to eighteen feet long; all but the oak to be square edged, and the oak to be free from heart, during the years 1872 and 1873, at different prices named, the lumber to be delivered by the plaintiff and to be accepted by the defendant on the cars at Listowel station, on the Wellington, Grey, & Bruce Railway, as follows: the basswood lumber to be delivered in thirty days after the same should be piled at the railway station, and the balance to

be delivered as aforesaid, and when reasonably dry, the lumber to be paid for from time to time when shipped. Averment that all things were done and all times elapsed necessary to entitle the plaintiff to have the lumber accepted, yet although defendant did accept and pay for a part, he refused to accept the residue.

Pleas—1. Did not promise. 2. Plaintiff not ready and willing, nor did he offer to deliver. 3. Defendant did not refuse to accept. 4. Rescission before breach. 5. That one of the terms of the agreement was that the said lumber, before the delivery thereof by the plaintiff and acceptance thereof by the defendant, should be subject to the inspection of one Sills, mutually agreed upon by the plaintiff and defendant for such inspection, and that a reasonable notice should be given by the plaintiff to Sills when the lumber would be ready for his inspection, and no notice whatever was given to Sills that any lumber was ready for inspection.

Issue.

The cause was tried at the Hamilton Assizes, before Strong, J., and a jury.

The agreement relied on by the plaintiff was in writing, and was as follows:—

“Hammond, Ontario, Nov. 2, 1872.—I hereby agree to buy 100 M. or less, cherry and butternut, and 50 M. each black birch, soft and hard maple, and 100 M. basswood, of Andrew Aitcheson, during the years 1872 and 1873, as follows:—Basswood, beech, birch, soft and hard maple, at \$12 per M.; cherry, oak, and butternut, at \$20 per M. All to be sawed one inch thick, from six to twenty inches wide, to average thirteen inches wide, not under twelve nor over sixteen feet long, culls all out and all good merchantable lumber, by G. F. or J. Sills's inspection, delivered on cars at Listowell station, W. G. & B. R. R.; said lumber to be shipped as follows: basswood in thirty days after it is piled at railroad, the rest when reasonably dry; also 50 M. oak, two, three, and four inches thick, from ten to eighteen inches wide, average fourteen inches, twelve to

eighteen feet long, at \$20 per M., delivered on cars same as the rest; beech, birch, basswood, soft and hard maple, cherry and butternut, all to be square edged; all but the oak to be free from heart. SIMEON COOK."

The plaintiff was called as a witness at the trial. He proved the agreement. He proved that the stock was not in hand at the time the agreement was made. The agreement was signed on Saturday evening. It was intended that it should contain white and black oak. Defendant said on Sunday that Mr. Poole should act for him. Afterwards defendant said that anything Poole did for him was done by his authority. He shipped all the butternut, cherry, oak, and part of the basswood, and four cars of hard maple. It was shipped under the agreement. It was consigned to Poole at Buffalo. This was done by defendant's orders. Defendant paid for what was so shipped to Poole. Witness also swore, in the first instance, that he had on hand at the station 150,000 feet of hard maple, soft maple, beech, birch, white and black ash. A portion of it, however, was, he afterwards admitted, at the mills. But he said he thought there was 100,000 feet ready for delivery under the contract. Defendant lives at Ingersoll. He saw him in Ingersoll in May, 1874, and defendant then said he had no place to put the lumber. The lumber was at the station as early as December, 1873. Defendant wished the lumber to stand over for a week or two until he should go to Listowel to see the plaintiff. A month or six weeks afterwards plaintiff again went to Ingersoll and saw defendant. He told him he wanted him to take the lumber, as he, plaintiff, wanted the money. Defendant said he wanted a week or two further time. Plaintiff again saw him in July or August following. During the last day of August or beginning of September defendant and Poole went to Listowel and examined all the lumber piles and examined the cars. It was then arranged that defendant should send on an inspector. He wished to send an inspector named Green, from Buffalo. Plaintiff objected to Green. It was

then arranged that defendant should give plaintiff a week's notice of sending an inspector. This was the last communication that took place between the parties. Defendant never sent an inspector.

It was proved that the lumber was afterwards unsaleable. Sills, the person named in the contract as inspector, lived at Mitchell. He was never asked by either party to inspect the lumber. Each kind of lumber was piled by itself at the station. Culls had never been separated. It was also proved that in inspecting lumber the inspector examines it board by board, turning them over, and thereby separates merchantable lumber from the culls.

There was evidence that, according to the general usage of the lumber trade, the purchaser pays for the inspector and the seller puts the lumber on board the cars, and that the usage is to inspect either before or as it is going on.

A letter was put in by the plaintiff, written by the defendant to him on 26th Sept., 1873, in which defendant says that he desired plaintiff "to hold up" for a little for two reasons:—1. The then existing financial difficulties in the lumber trade. 2. By Poole's inspection plaintiff's inspection for culls and average widths would not be accepted. So, in conclusion, he asked him to discontinue shipments for the present.

A second letter, written by defendant to plaintiff on 27th July, 1874, was also put in evidence by plaintiff. In it he referred to the inactivity of the market for hard woods as well as other kinds of lumber. He also referred to the inspection of the widths being very different from the contract in most of what the plaintiff had shipped, and promised, if possible, to send Mr. Poole to inspect the remainder of the lumber.

Application was made by plaintiff's counsel for leave to amend the declaration by meeting the facts as to inspection, and alleging as a breach that the defendant did not procure the lumber to be inspected; but it was refused by the learned Judge except on the terms of adjourning the trial



and paying the costs of the day. Neither defendant nor his witnesses were in attendance, and the trial was forced on in its order on the docket in their absence.

The learned Judge thought that the defendant was bound to procure inspection, and that the proper form of action would have been for not procuring inspection, and so thinking, entered the verdict for defendant, reserving leave to plaintiff to move to enter a verdict for \$1,200 damages.

In Hilary term, February 2, 1875, *Edward Martin* obtained a *rule nisi*, calling on the defendant to shew cause why a verdict should not be entered for the plaintiff for \$1,200, being the amount agreed on at the trial, on the ground of misdirection of the learned Judge, in holding that under the contract and the facts proved on the trial, the inspection of the lumber in question was a condition precedent, and that the defendant was not bound to accept the same till inspected; or why the declaration should not be amended as applied for at the trial, by stating that it was the defendant's duty to procure the inspector, and assigning a breach of this duty, or by averring a waiver by the defendant of the inspection, or by making such other amendment as might be necessary to determine the rights of the parties and decide the real question at issue according to the provisions of the Administration of Justice Acts and Law Reform Acts, and why the verdict now entered should not be set aside and a verdict entered for the plaintiff for \$1,200, upon such amendment being made according to the provisions of the said Acts.

During this term, November 27, 1875, *MacKelian* shewed cause. Inspection was a condition precedent to the obligation of defendant to accept: *Thurnell v. Balbirnie*, 2 M. & W. 786; *Vickers v. Vickers*, L. R. 4 Eq. 529; *Milnes v. Gery*, 14 Ves. 400; *Wilks v. Davis*, 3 Mer. 507; *Cooper v. Shuttleworth*, 25 L.J. Ex. 114; *Blackburn on Sales*, 151 *et seq.* There was no waiver on the part of the defendant as to the condition about inspection; it was not the defendant's

duty to find the inspector, and even if it was there was no request to defendant and no count in the declaration for any such cause of action.

*Edward Martin contra.* There is nothing in the contract as to who is to procure the inspector. It contains no provision that there shall be no payment till inspection. In such a case the Court may look to the dealings of the parties, or to the usages of trade, as bearing on the interpretation of the contract: *Addison on Contracts*, 7th ed., 241; *Hutchison v. Bowker*, 5 M. & W. 535. Inspection was never insisted upon as to the first shipments. There was nothing said about inspection till the letter of 26th Sept., 1873, when defendant proposed inspection by Poole—not by Sills. It was quite competent to waive inspection by Sills. If the declaration needs amendment, the amendment ought to have been made under sec. 50 of the Administration of Justice Act: *Bank of Montreal v. Reynolds*, 24 U. C. R. 381; *Petrie v. Tannahill*, 22 U. C. R. 608; *Robinson v. Shields*, 15 C. P. 386; and ought if necessary now to be made: *Clarke v. McKay*, 32 U. C. R. 583.

He also referred on other points to *Re Goodwin v. Ottawa & Prescott R. W. Co.*, 13 C. P. 260; *Regina v. Commissioners, &c., of the Thames*, 8 A. & E. 901; *Hall v. Conder*, 2 C. B. N. S. 22, 53.

December 23, 1875, HARRISON, C. J., delivered the judgment of the Court.

We are of opinion that the inspection by G. F. or J. Sills is a condition precedent to defendant's obligation to accept the lumber sold. His obligation is not to accept any good merchantable lumber of the descriptions mentioned in the contract, but only good merchantable lumber by G. F. or J. Sills's inspection. The inspection by G. F. or J. Sills is therefore a condition precedent to the plaintiff's right to recover. See *Elliott v. Hewitt*, 11 U. C. R. 292, 295; *Vickers v. Vickers*, L. R. 4 Eq. 529; *Walker v. Kelly*, 24 C. P. 174; *O'Neil v. McIlmoyle*, 34 U. C. R. 236.

But as this condition is one for the protection and advantage of the defendant, it was quite competent for him before breach to have waived it, or by a subsequent agreement to have provided for a different inspector to the inspectors named in the agreement: *Clarke v. McKay*, 32 U. C. R. 583; *Anglo-African Co. v. Lamzed*, L. R. 1 C. P. 226.

There was evidence of waiver or substitution of a new agreement as to the inspection, which on a proper declaration and on proper pleadings might have been submitted to a jury.

The performance of a condition precedent may be dispensed with or excused so as to render the conditional liability absolute without performance. Where the performance of the contract by the plaintiff forms a condition precedent to the liability of the defendant, and the plaintiff is ready and offers to perform his part, but the defendant refuses to accept it, the liability of the defendant becomes absolute without performance. So if the defendant by his own neglect or default prevents the performance of a condition precedent to his liability, it may be equivalent to performance in rendering his liability absolute: *Leake on Contracts*, 351.

Here the contract is silent as to the party whose duty it is to appoint the inspector, and evidence was received without objection that, according to the usage of the trade, under such a contract it is the duty of the purchaser to procure the inspector.

Evidence was also given without objection of the conduct of the parties as tending to the same conclusion.

If it was the duty of the defendant to appoint the inspector, as ruled by the learned Judge at the trial, there ought to be a count added for breach of that duty.

It is impossible, in the present state of the record, to hold that the plaintiff is entitled to recover, and for this reason we cannot make absolute the rule to enter the verdict for the plaintiff.

It may be that on a properly framed declaration the

plaintiff will ultimately succeed, but it would not be just to the defendant to permit an amendment as to waiver or otherwise which would conclude him, without having had an opportunity of adducing his testimony in answer to the testimony of the plaintiff.

Had all the evidence been adduced and the case been tried on its broad merits, we might have felt compelled to exercise the liberal powers of amendment now conferred on us to make the record answer the evidence, for the purpose of disposing of the real question in controversy between the parties.

But under existing circumstances, we do not think it would be, in the language of sec. 50 of 36 Vic., ch. 8, "for the advancement of justice" to make such amendments.

We make the rule absolute for a new trial, in order that all necessary amendments may be applied for and made, and the evidence on both sides adduced, and the cause, if possible, disposed of "according to the very right and justice of the case."

The rule will be absolute on payment of costs by the plaintiff.

*Rule absolute accordingly.*



## FAUGHER V. BURLEY.

*Lease—Construction—Forfeiture—Demand of rent.*

The plaintiff leased premises from defendant at a rent of \$150 a year, covenanting to pay rent, &c., and it was added "this lease will be void if the said plaintiff fail to perform this agreement."

**Held**, that the last clause would only make the lease voidable at the option of the lessor, not void: and that to entitle the lessor to determine the lease for non-payment of rent, a formal demand was necessary.

**Quare**, whether the words "this agreement" would apply to the covenant to pay rent.

THE first count in the declaration was for eviction, setting out the lease under which the plaintiff held the premises in question from the defendant, being a storehouse with a pair of scales, &c., in the village of Meaford, for the term of one, three, or five years from the 1st of October, 1869; The rent to be paid quarterly, the first quarter to be paid on the 1st of January, 1870. Rent \$150 per annum. Covenants on the part of the plaintiff not to make alterations without written consent; &c.; the defendant to pay the taxes; and the plaintiff not to assign or lease the premises. "This lease will be void if the said plaintiff fail to perform this agreement." 2nd count: Trespass. 3rd count: For an assault.

Pleas to first count: 1. *Non est factum*.

2. No eviction.

3. Surrender of premises and residue of term.

4. Surrender in law by the plaintiff giving up the key. The fifth plea had been struck out by order.

6. Not guilty, to second and third counts.

7. As to second count, *liberum tenementum*.

8. Premises not the plaintiffs.

9. Leave and license.

10. To third count, *son assault demesne*.

11. To third count: that the plaintiff preferred a charge for assault, &c.: that the defendant was convicted and fined; and that he paid the fine, &c.

Replication: 1. Issue on all the pleas.

2. To the seventh plea setting up the lease of the premises set out in the declaration—entry on premises, &c., until the defendant broke and entered the same; and that the plaintiff did not elect to determine, and did not determine, the said term at the end of either one or three years.

Issue.

The cause was tried at the Fall Assizes, at Owen Sound, in 1874, before Strong, J.

On the trial the plaintiff gave in evidence the lease; that he went into possession on the 10th of October, 1869; was in possession for first year: that after the end of that year he was sued twice for rent by the defendant: that he tendered the first quarter's rent of the fourth year, falling due 1st of January, 1873: that he went into the defendant's store on the 31st of January, 1873, and offered him the quarter's rent then due; and that as he was leaving and going out of the door the defendant struck him with a very heavy chain, and that he was seriously hurt and required medical attendance, &c.: that on the same day, 31st January, 1873, when he offered the defendant the rent, the defendant broke into the store-house, the demised premises, and took possession: that at this time the plaintiff had made arrangements to store grain: all the storage in Meaford was then taken up: he valued the storage at \$200 for that winter.

In cross-examination he stated that he occupied the premises all the year 1869, and part of the next: that in December, 1870, he took two young men in as partners in business on the premises: that he did not assign his lease or sub-let to them: that he soon afterwards left the village, and he wanted the defendant to take the two young men, Wardells, for the rent, but he would not accept them for the rent, and after that the defendant sued him in the Division Court for the rent, and which action he defended; and in that action the plaintiff stated the defendant took the Wardells for the rent; and in the second action for rent, that he said the defendant should have sued the Wardells—at this time they had left the premises: that in

the spring of 1872, shortly after the Wardells left, he threw the key down at the defendant's back door.

On re-examination: he said that the suit for rent, tried in January, 1873, was for rent due on the 1st of October, 1872. On that occasion the defendant swore that he never took the lease back, and that he had nothing to do with the Wardells, and that he contended the plaintiff was still his tenant.

A witness, *Stewart*, testified to the defendant's taking possession of the premises: that the place was locked, and that the defendant took off either one or two boards and got into the storehouse. This was after the last Division Court suit for rent. Another witness said that on the morning that suit was tried he saw the defendant: that the defendant said he was suing the plaintiff for rent: that his lease had nine months to run yet, and that he was going to sue him every quarter: that witness went to hear the trial. On that same day he told witness there was a quarter's rent due, and he was going to sue him for it.

Evidence was given as to the damages for loss of use of storehouse.

For the defence the defendant was examined. He stated that the plaintiff in the fall of 1870 was in arrear for a quarter's rent: that the plaintiff was then in possession: that he distrained: that the plaintiff continued in possession till the 10th October, 1872: that he had sued the plaintiff three times for rent: that his defence was, that he had given up the storehouse: that on the day of the third suit he took possession: that when the plaintiff offered him the rent he told him he owed him none: that he had taken possession of the store: angry words afterwards passed between them in reference to what had been sworn in Court; and that he struck the plaintiff with a chain: that he was summoned for the assault and fined: that he paid the fine, he thought, before the 21st of August, 1873, this action being commenced in May, 1873.

On cross-examination he stated that he made no arrangement with the plaintiff as to taking possession on the 1st

of February, 1873; and that on that evening the plaintiff was willing to pay the quarter's rent due 1st of January.

One *Moffat* testified that he had several conversations with the plaintiff about the matter: that on several occasions he said to witness, what was the use of the defendant continuing to sue him for the rent: that he took the keys and threw them into his house.

At the close of the case the defendant's counsel contended that the lease was forfeited for non-payment of the quarter's rent due at the time of the entry by the defendant: that there was no necessity for a demand of the rent, as the lease was to be void.

The learned Judge was of opinion the lease and covenants became void on the defendant's re-entry on the 1st of February, 1873, and so there was no covenant on which the action could be maintained: but he asked the jury to say the amount of damages, assuming the lease to be a subsisting one, and he entered a verdict for the plaintiff for such sum, reserving leave to the defendant to enter a verdict on that count. As to the assault charged in the third count, he would leave it to the jury as if no conviction were proved; and the learned Judge was of opinion there was no evidence of a surrender. The jury found for the plaintiff \$75 damages on 1st count, for the defendant on the 2nd count, and for the plaintiff on the third count, and \$25 damages.

In the following term, November 21, 1874, *F. Osler* obtained a rule to enter a verdict for the defendant on leave reserved, and calling on the plaintiff to shew cause why the fifth plea, formerly pleaded and struck out by order, should not be restored, or a new plea to the like effect added, and the verdict entered on it, or for a new trial on the ground that it appeared that the lease was terminated and put an end to by the breach of the covenants in such lease.

During last term, November 24, 1875, *J. K. Kerr* shewed cause, and referred to *Dann v. Spurrier*, 3 B. & P. 399, 402; *Doe Webb v. Dixon*, 9 East 15; *Woodfall* L. & T. 10th



ed. 147; *Acocks v. Phillips*, 5 H. & N. 183; *Barry v. Glover*, 10 Ir. C. L. 113; *Adams on Ejectment*, 4th ed. 133; *McNaughton v. Wigg*, 35 U. C. R. 111.

*F. Osler* contra, relied on *Kavanagh v. Gudge*, 5 M & G. 726; *Davis v. Burrell*, 10 C. B. 821; *Shaw v. Coffin*, 14 C. B. N. S. 372; *Hill v. Kempshall*, 7 C. B. 975.

December 23, 1876. MORRISON, J., delivered the judgment of the Court.

The material question here is, whether the defendant, in the month of February, 1873, when he took forcible possession of the premises, had then a right to do so. It is clear from the evidence the defendant had been accepting and enforcing payment of the rent under the lease up to the time of the quarter's rent which fell due on the 1st of January, 1873. That quarter's rent was not paid on the day it fell due. No demand was ever made by the defendant for the rent, and on the day the defendant took possession and evicted the plaintiff, the plaintiff tendered to the defendant the rent, which the defendant refused to accept. The stipulation at the end of the lease, "This lease will be void if the lessee fail to perform this agreement," assuming that the words "this agreement" was meant to apply to the covenant to pay the rent, which is not very clear, the construction of such a proviso or agreement is, that the lease shall be voidable only at the option of the lessor: *Doe d. Bryan v. Bancks*, 4 B. & Ald. 401; *Arnsby v. Woodward*, 6 B. & C. 519; *Doe d. Nash v. Birch*, 1 M. & W. 402.

It is also, I think, settled law that in order to take advantage of such a proviso, and to entitle the lessor absolutely to determine the lease for non-payment of the rent, a formal and legal demand of the rent is necessary.

It is laid down in *Comyn's Law of Landlord and Tenant* 327, where the landlord is about to enter for a forfeiture for non-payment of rent, the common law requires a previous demand of the rent due, with circumstances of great particularity, on the very day the rent becomes due, at a

convenient time before sunset, &c., and that this demand must be made *in fact*, his claim being regarded *stricti juris*. If, after this formal demand, the tenant refuses or neglects to pay his rent, the lessor's right to enter is complete.

So in *Duppa v. Mayo*, 1 Wm. Saunders, ed. 1871, 440, where the matter is fully discussed, the same principle is held.

And at page 442 it is said: "But if there be a lease *for years*, with a condition that, for non-payment of the rent, \* \* the lease shall *be null and void*, if the lessor make a legal demand of the rent, and the lessee neglects or refuses to pay, \* \* the lease is absolutely determined." There was no pretence that here any demand of the rent was made. The defendant was therefore not authorized to enter or evict the plaintiff, as it appears he did, and our judgment must be for the plaintiff.

The rule asked that a plea should be added, a copy of which was filed, setting up the non-payment of rent, and re-entry for the forfeiture. From the evidence given at the trial I cannot see in what way the plea could be sustained. The plea itself, I think, is bad under the authority of *Kavanagh v. Gudge*, 5 M. & G. 726.

I may mention that in that case the Court refused an amendment, as they would not favor a forfeiture.

We think the rule should be discharged.

*Rule discharged.*

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## WILDE V. BOWEN.

31 Vic. c. 28, s. 60—*Action for penalty for assault at election*—"Every person convicted."

Sec. 60 of the 32 Vic. ch. 21, O., enacts that "every person convicted" of a battery committed during any part of the days whereon "any election is to be held, within two miles of the place where such election is so held, &c., "shall incur a penalty of fifty dollars."

By sec. 77, all penalties imposed by the Act shall be recoverable by any person who will sue for the same by action of debt or information in any Court having competent jurisdiction. And it shall be sufficient for the plaintiff on any such action or suit to state in the declaration that the defendant is indebted to him in the sum of money thereby demanded and to allege the particular offence for which the action is brought, and that the defendant has acted contrary to the Act.

It was *held* in the County Court that the words "Every person convicted" &c., did not mean who had been convicted in some criminal proceeding, but that the offence might be proved, and the person "convicted," in this action.

On appeal WILSON, J., was of opinion that the judgment below was right: MORRISON, J., that it was wrong. The appeal therefore was dismissed.

APPEAL from the County Court of the County of Lennox and Addington.

The declaration contained two counts, both founded on the 32 Vic., ch. 21, sec. 60, O.

The first count stated that the defendant was indebted to the plaintiff in the sum of \$50, for that after the passing of the Election Law of 1868, to wit, on the 18th of January, 1875, at an election holden in and for the Electoral District of the County of Addington, of a member to serve in the Legislative Assembly of the Province of Ontario for the said Electoral District, and during the day, while such an election was being held and proceeded with, and within the distance of two miles of the place where a poll for the said election was held and then being proceeded with, the defendant beat, struck, and kicked the plaintiff and otherwise committed batteries upon him, contrary to the form of the said statute, whereby the defendant became liable to forfeit, and forfeited the sum of \$50 to the plaintiff, who sues the defendant for the same in this action under the said statute.

The second count was substantially like the first count. Demurrer to the declaration, because—

1. The declaration discloses no just or legal right in the plaintiff to recover from the defendant the sum of \$50 therein mentioned and sued for.

2. It does not appear by the declaration that the defendant has been convicted of the battery in the declaration alleged to have been committed by the defendant in any Court or tribunal having jurisdiction to try and convict for such offence, and until such conviction is had this action cannot be maintained.

Joinder.

The learned Judge of the Court below, after argument, gave judgment on the demurrer for the plaintiff.

In his judgment he set out the following sections of the statute :

Sec. 60. "Every person convicted of a battery committed during any part of the days, whereon any such election, or any poll for such election, is to be begun, holden, or proceeded with, within the distance of two miles of the place where such election or such poll is so begun, holden, or proceeded with, shall incur a penalty of fifty dollars."

Sec. 77, sub-sec. 1. All penalties imposed by this Act shall be recoverable, with full costs of suit, by any person who will sue for the same by action of debt or information, in any of Her Majesty's Courts in this Province having competent jurisdiction; and in default of payment of the amount which the offender is condemned to pay, within the period to be fixed by such Court, such offender shall be imprisoned in the common gaol of the place until he has paid the amount he has been so condemned to pay and the costs."

Sub-sec. 2. "It shall be sufficient for the plaintiff in any action or suit given by this Act, to state in the declaration that the defendant is indebted in the sum of money thereby demanded, and to allege the particular offence for which the action or suit is brought, and that the defendant has



acted contrary to this Act, without mentioning the writ of election or the return thereof."

Sub-sec. 3. "It shall not be necessary on the trial of any suit or prosecution under this Act, to produce the writ of election or the authority of the returning officer founded upon any such writ of election, but general evidence of such facts shall be sufficient evidence."

Sub-sec. 4. "Every action, suit, or information given by this Act, shall be commenced within the space of one year next after the act committed, and not afterwards."

And the learned Judge then proceeded: "It was contended, on the part of the defendant, that the words 'convicted of a battery,' in the 60th section, had a distinct and independent meaning, and that what was intended by them was that the person committing the offence should be proceeded against criminally, and if convicted, then that a civil suit might be brought to recover the penalty, and that the certificate from the Criminal Court would be conclusive evidence of the defendant's guilt. I am unable to concur in such an argument. I think the conviction mentioned in the 60th section means a conviction in a civil action, and if the issue to be tried in a civil suit for the recovery of the penalty, might very properly be, whether the defendant committed the battery or not. It ought to be the main question. But if the contention of the defendant prevailed, it could not be raised on this record at all. There seems to me to be no reason for the trial in a criminal Court first, but a good deal of reason against it. The defendant would be deprived of one of the rights which he possesses in a civil suit to make himself a witness in his own behalf. It might also lead to defeating the plaintiff's action entirely, as in a criminal case, when, for good reason, the trial is postponed from time to time, for over a year, then the civil action would be defeated. The defendant also might, by keeping out of the way for a year, escape the consequences resulting from his improper conduct. I feel quite free from difficulty in deciding that the 60th section of the Act has no such meaning as that con-

tended for by the defendant, but that the conviction mentioned in it has reference to a conviction in a civil action. I am also of opinion that it would be unnecessary to allege the conviction in the declaration, even did the 60th section bear the interpretation which the defendant claims for it, inasmuch as sub.-sec. 2, before quoted, points out and provides what statements it will be sufficient for a declaration to contain, in which case the objection would be ground for a nonsuit on the evidence, and could not be made on demurrer to the declaration. The judgment will therefore be for the plaintiff on the demurrer."

Against this judgment the defendant appealed.

The reasons of appeal were in substance the same as the grounds of demurrer before taken.

The case was argued in Trinity Term, August 31, 1875, by *M. C. Cameron, Q. C.*, for the appellant. The objections which were argued in the Court below were well taken. The words of the section of the Act, "Every person convicted," mean every person *who shall have been* convicted, that is, convicted previously to his bringing of the action for the penalty. And the Legislature purposely so provided, in cases of the kind, because it intended the person offending should be subject to the ordinary punishment before a magistrate or otherwise for the criminal offence, and then in addition to it pay the penalty of the \$50 specially imposed. It was a mode adopted by the Legislature of Ontario to add to the criminal punishment in such a case, and by such a mode of proceeding, because it could not add directly to the punishment of the criminal offence, as all matters of criminal law belonged exclusively to the Dominion Parliament. The Legislature of Ontario intended also that such a person should never pay less than \$50. While, if the criminal law only dealt with the case, a paltry fine might be imposed for the act which the Ontario Legislature deemed to be a very serious offence. If the civil action alone is brought, then the plaintiff is demanding a penalty before the defendant is convicted, and before he can know the defendant is to pay it. But if he bring the criminal pro-

ceeding first, and convict the defendant, he knows when he brings his civil action that he is entitled to the penalty he demands.

*Reeve, contra.* The word *convicted* does not require the addition of the words "shall have been" to be made to it. The section means every person who *is* convicted, and he may be *convicted* in a civil as well as in a criminal case. The party prosecuting for a penalty must always sue for it before he knows the person sued for it will have to pay it. The conviction means the judgment of the Court. The verdict of guilty or the confession of the defendant enables the Court to give judgment—that is, to convict the defendant—and upon that conviction the penalty is given in the same suit. There is no occasion for two actions or prosecutions. *Burgess v. Boetefeur*, 7 M. & G. 481; *Cuming v. Sibly*, 4 Burr. 2489; *Sutton v. Bishop*, 4 Ibid. 2283; shew, what the true meaning of *conviction* or *convicted* is.

December 23, 1875, WILSON, J. The learned Judge in the Court below said: "I feel quite free from difficulty in deciding that the 60th section of the Act has no such meaning as that contended for by the defendant," and I must say I quite agree with the opinion so plainly expressed.

If the provisions of the Act mean that any person convicted in a civil action of a battery shall be subject to the penalty of \$50, I am of opinion the plaintiff is entitled to maintain this action. And I think that is the meaning of the statute, because the remedy is to be by action of debt or information for the penalty, and in any such action or suit the plaintiff shall state in the declaration that the defendant is indebted in the sum of money thereby demanded.

The penalty is to be sued for in any of Her Majesty's Courts having competent jurisdiction—that is competent jurisdiction to entertain the action or suit for the penalty. I do not think it means jurisdiction to award imprisonment in case the defendant fail to pay the penalty within

the time fixed by the Court, because that will follow if the Court have jurisdiction of the cause and subject of the suit. But it may be that the statute means that the Court shall have competency to try the *particular offence* charged as a battery or otherwise, as the case may be. I am not sure, however, whether the statute has not given jurisdiction over *the particular offence* to any Court which has a jurisdiction to the extent of \$50.

The argument against it is that there can be no *information* in some Courts nor is there any *declaration*. It is not necessary to follow this further.

As to the imprisonment being awarded by a County Court in such a case, it is not in anyway different from what may be done at *Nisi Prius* under the Insolvent Act, and which I acted under in *McKenzie v. Dodds*, tried before me at Hamilton in October, 1872, under the Insolvent Act of 1869, sec. 92.

As this is, in my opinion, a civil remedy which the Act provides, I am relieved from the enquiry as to the constitutionality of the enactment if the remedy had been of a criminal nature ; or if it could be said, as was argued for the defendant, that the penalty was intended to be an aggravated or superadded punishment to the judgment in the criminal case, so as to ensure a sufficiently severe punishment in every offence of that description.

I do not believe the Legislature intended, by any indirect means, to add to or to impose punishment in criminal cases over which it has no control, and it is not to be assumed it has attempted to do anything so utterly illegal. It certainly has not done it, and that is sufficient for this case.

There can be no usurpation of power in the Ontario Legislature declaring that on any battery committed, contrary to the statute, which must be presumed to be such a battery as it has authority to deal with—that is a battery for which redress is sought for by a civil action—the penalty shall be for a particular amount, although that battery may also be prosecuted for by a criminal remedy, and punished accordingly.



The Legislature might enact that in all felonies the civil remedy may be followed before or independently of any criminal prosecution for or in respect of it.

Or (if the law had not been already altered) that in case of the death of one, by the negligence of the other, the personal representative of the deceased should have a civil remedy against the person in fault, although the death was occasioned by an act of felony. Because these would be civil proceedings in no way interfering with the power of the Dominion Parliament over criminal law.

So here the Ontario Legislature had the power to pass this enactment relating, as I think it does, to a merely civil matter, and to a civil remedy for it.

Then as to the principal point of the argument. Is it necessary the defendant should first be convicted criminally before he can be proceeded against civilly for the penalty under the statute?

I am of opinion, as already stated, it is not necessary.

The Courts do not always favour a public and a private prosecution. A criminal information will not be granted for a libel unless the prosecutor will renounce his civil remedy.

And although a person may prosecute criminally and civilly for a battery, the damages in the civil action will in fact be very much affected by the punishment imposed in a criminal case. The statute plainly does not require it, for the declaration is only to state that the plaintiff demands his penalty for the particular offence which has been committed contrary to the statute. The offence, then, is to be tried. There is nothing said of stating a previous conviction, and surely that would have been expressly mentioned and provided for if it had been intended there should first have been such a conviction.

The argument, that on proof of the previous conviction it should be held conclusive of the fact of the battery, would be to reverse all the rules which regulate estoppels, and which make them binding only where there is mutuality and privity. But what mutuality or privity is there between the plaintiff and defendant in the civil suit as to

what was done in the criminal suit between the Crown and the defendant. It has always been held there is no estoppel in such a case. Then again, it would be hard to create, and by implication, an estoppel in a suit in which the defendant can be a witness by a proceeding in which he was precluded from being a witness.

In the case of *Darries v. Brecknell*, L. R. 3 P. & D. 88, the Judge of the Probate and Divorce Court refused to grant a new trial in the cause, or to disbelieve the witness on whose evidence the decree was chiefly founded, although he had been convicted of perjury for the evidence he had given, because the witness had been hardly dealt with by having the truth or falsity of his evidence tried in a cause in which his mouth was closed.

In my opinion the section is quite plain, that "Every person convicted of a battery at the time mentioned in the statute, shall incur a penalty of \$50,"—that is, every person *who is* convicted of it shall incur the penalty; although the words *who is* are in no way or sense required as to the sense, meaning, effect or comprehension of the enactment.

Some stress was laid on the word *convicted*; that it signified a criminal prosecution. That is quite a mistake.

Every person who has a judgment in a civil action pronounced against him *is convicted*.

The execution in a common civil action, in reciting the judgment against the party, concludes "*whereof he is convicted*."

Nothing can therefore be inferred from the use of that word, that a criminal proceeding was intended first to be taken.

The authorities referred to by Mr. Reeve shew the conviction in civil cases is the judgment.

The learned Judge in the Court below has pointed out many difficulties which might stand in the way of a recovery under the statute if the party had to be first criminally convicted.

I presume the allegation in the declaration, and required by the statute, "that the defendant has acted contrary to

this Act," must require the plaintiff to prove a battery in some way connected with, or relating to, or arising out of, or affecting in some way, remotely or otherwise, the election. The words, that the defendant beat, &c., the plaintiff or some other person, within two miles of the place of election, or poll, would cover the punishment—wrongful let it be—of a child by a parent, or of a scholar by a teacher, or any blow or slap given by any one to another for some trifling matter in no way conceivably connected with or affecting the election. However that may be, it will be time enough to decide it if it ever arise. My attention was drawn to it from the extreme generality of the declaration.

On the points raised before us I see no cause for doubt or difficulty, and in my opinion the appeal must be dismissed.

MORRISON, J.—I regret to say that I cannot concur in the judgment of my brother Wilson.

In this case I am inclined to think that by the use of the words, "convicted of a battery," in the 60th section of the Ontario Act, the Legislature meant, and intended to mean, that if any person was convicted and found guilty of such a battery as the section refers to, in the ordinary course provided by the criminal law, either by indictment, or in any summary way, in such case the person so convicted should incur a penalty of \$50. The Legislature had in view the punishment which the criminal laws of the Dominion authorized to be inflicted in the case of a conviction for a battery, and considering that such a crime, when committed during an election, ought to be punished with greater severity, or that the punishment was not sufficiently stringent or certain, with a view of deterring persons from the commission of such a crime during an election, deemed it expedient to add a further punishment after a conviction by means of a civil suit for the penalty mentioned, and imprisonment in default of payment.

When we look at the corresponding section in the Act

repealed by the Ontario Act, 32 Vic., ch. 21, Consol. Stat., C. ch. 6, sec. 73, we find that the committing of a battery under the same circumstances was, by that Act, deemed an aggravated assault, and punished accordingly. And the Ontario Legislature, in repealing that statute, and enacting the 32 Vic., finding that they could not, under the British North America Act, interfere with the criminal offence, and declare a battery to be an aggravated assault, substituted the 60th section in lieu thereof. There can be no doubt that the words in the 75th section of the repealed statute meant a conviction in the usual way by indictment, and the words there used are the same as those used in the 60th section of the 32 Vic.

And I may here remark, that the other offences mentioned in the latter statute, by which parties offending incur penalties, were, by the repealed statutes, declared to be misdemeanors, &c.

The local Legislature, in my opinion, seeing the constitutional difficulty of declaring these breaches of the election law to be crimes, and punished as crimes, adopted this mode of declaring that parties offending should incur certain penalties, to be recovered in a civil suit at the instance of any person who might sue for the penalty. As to a battery during the election, that, however, being in itself a crime, punishable by the criminal law of the Dominion, superadded, that after conviction in the usual way (as I take it), a penalty recoverable in a civil suit as a further punishment.

Whether such legislation is strictly constitutional, at present I express no decided opinion, but I may remark, that if the local Legislature can constitutionally do what the appellants contend they have done here by the 60th sec., then upon the like principle they may so enact with regard to any other crime, such as perjury, larceny, &c., and by the use of such words provide, that in a civil action a person may be prosecuted, tried and convicted of the criminal offence, and punished by such a penalty as the local Legislature may think proper to inflict, and imprisonment until paid.



I am not prepared to concur in that view, nor do I think, as I have already said, that the Ontario Legislature so intended to enact by passing the 60th section. The contention of the appellant goes so far, that if a person charged with a battery during an election is tried and acquitted, yet, notwithstanding his acquittal, he may again be tried and convicted in a civil suit for the same offence, and punished under the 60th section.

I think the appeal should be allowed; as the Court is divided in opinion there will be no costs.

*The Court being equally divided the appeal was dismissed.*

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### DALBY v. HUMPHREY.

*Promissory note—Interest recoverable after maturity.*

Where a day is named for payment of a note with interest at a rate specified the claim for interest after that day is a claim for damages, for breach of the contract, not as upon an implied contract, and is in the discretion of the Court or jury.

Where a note was made, in British Columbia, payable 150 days after date, with interest at two per cent. a month, the Court, under the circumstances stated in this case, allowed only six per cent after maturity.

ACTION on a promissory note dated 1st May, 1865, for \$1,000, made in British Columbia by the defendant, payable to the order of R. Watson & Co., 150 days after date, with interest at 2 per centum per month, which was duly endorsed by R. Watson & Co. to the plaintiff.

Pleas 1. *Non fecit*. 2. That the plaintiff was not the lawful holder. 3. In substance an extinguishment of the debt represented by the note, by an arrangement between R. Watson & Co, the defendant, and one Black, made after the note was drawn and before suit, and while Watson & Co. were the holders.

The cause was tried at the Guelph Fall Assizes, 1874, before Galt J., without a jury, when a verdict was rendered for the plaintiff for \$3,280.

The note in question (with another note paid by defendant at maturity) was given by defendant to Watson & Co. in payment for an ox-team. By some means, not very clear on the evidence, one Robertson, a clerk of W. & Co., became the holder of the note and transferred it to the plaintiff for value. It also appeared that defendant before leaving British Columbia had made some arrangement with a member of the firm of W. & Co. to pay the note through one Black.

There was a good deal of evidence taken, which is not necessary to set out further than appears above and in the judgment, as the sole question on which it is thought necessary to report this case is as to the rate of interest to be allowed after the note became due.

In Michaelmas term, November 18, 1874, *J. B. Read* obtained a rule *nisi* to set aside the verdict for the plaintiff and enter a nonsuit or verdict for the defendant, on the leave reserved.

In Easter term May 25, 1876, *Guthrie* shewed cause, and as to the question of interest submitted, if the Court thought the interest allowed excessive, that it should be reduced.

*M. C. Cameron*, Q. C., contra.

December 23, 1875. MORRISON, J., read the following judgment which had been prepared by RICHARDS, C. J., before leaving the Court, and which was concurred in by MORRISON, J., and WILSON, J. :—

[After deciding that on the evidence the plaintiff was entitled to recover the principal of the note.]

The note sued upon, dated 1st May, 1865, is payable 150 days after date, for \$1,000 and interest on the said amount at 2 per cent. per month. Was the learned Judge, or are we, bound to give this interest on the money after the note became due ?

No doubt it is a part of the contract between the parties to pay interest for the 150 days at that rate. But after that the plaintiff is entitled to damages for the deten-

tion of his money, and it does not necessarily follow that a jury or a court must give the amount of interest at the rate agreed upon as damages for the detention of the debt after the time of payment had elapsed.

The matter was much discussed in the House of Lords in the late case of *Cook v. Fowler*, L. R. 7 H. L. 29. There a warrant of attorney had been given, dated the 2nd May, to secure the payment of £1,330, with interest thereon at the rate of 5 per cent. per month, on the second of June, and in case of default in payment of the said sum of £1,330 and interest thereon on the day aforesaid, execution and other processes might then issue for the recovery of the said sum of £1,330 and interest, with costs, &c.

No judgment was entered up, and the party in whose favour the warrant was given claimed 5 per cent. a month as interest during the whole period the debt remained unpaid, and the chief clerk allowed it; but on appeal V. C. Stuart varied the chief clerk's certificate, and only allowed interest for one month at 5 per cent., and after that at the rate of 4 per cent. per annum. An appeal was made against the Vice-Chancellor's order to the House of Lords.

Lord Cairns, the Chancellor, refers to the principle that after the day named for the payment of the debt and interest, the claim is really for damages, and adds at p. 32, "Then it would be for the tribunal before which that claim was asserted to consider the position of the claimant, and the sum which properly, under all the circumstances, should be awarded for damages. No doubt, *prima facie*, the rate of interest stipulated for up to the time certain might be taken, and generally would be taken, as the measure of interest, but that would not be conclusive. It would be for the tribunal to look at all the circumstances of the case, and to decide what was the proper sum to be awarded by way of damages."

Lord Selborne, in his judgment, said at p. 37, "Although in cases of this class interest for the delay of payment *post diem* ought to be given, it is on the principle, not of implied contract, but of damages for a breach of contract. The

rate of interest to which the parties have agreed during the term of their contract may well be adopted in an ordinary case of this kind by a court or jury, as a proper measure of damages for the subsequent delay; but that is because, ordinarily, a reasonable and usual rate of interest, which it may be presumed would have been the same whatever might be the duration of the loan, had been agreed to. But in the case before your lordships the agreed rate of interest is excessive and extraordinary; and, although no question is raised between the present parties as to its fairness or reasonableness, so far as it was a matter of express contract, it by no means follows that it would have been fair and reasonable, or would have been so regarded by the borrower, if it had been indefinitely extended to every possible delay of payment after the stipulated time."

Lord Hatherley, at p. 37, in his judgment, refers to the following language of Mr. Justice Bayley, in *Cameron v. Smith*, 2 B. & Ald. 305: "Although, by the usage of trade, interest is allowed on a bill, yet it constitutes no part of the debt, but is in the nature of damages, which must go to the jury in order that they may find the amount; and it is competent for them either to allow 5 per cent. or 4 per cent., according to their judgment of the value of money; or they may even allow nothing, in case they are of opinion that the delay of payment has been occasioned by the default of the holder."

Now, here the defendant appears to have made some arrangement for the paying of this note through one Black before it became due and he left British Columbia. Robertson holds this note until December, 1870, and then transfers it to the present plaintiff as consideration for \$1,000 towards the purchase money of an interest in a tannery.

There is nothing to shew that Robertson ever claimed the amount of the note from defendant after it became due, and that he would expect 2 per cent. a month interest if not paid, nor is it shewn in fact that defendant knew it had not been paid. Robertson did not, apparently, con-



sider that 2 per cent. a month was to be added to the note from May, 1865, to December, 1870, when he gave it to the plaintiff as representing \$1,000, for the interest at 2 per cent a month for that period would be about \$1,340, making \$2,340, more than double the sum for which he renewed. Plaintiff obtained the note in December, 1870, and it was put in suit in February, 1871.

Under these circumstances we think 2 per cent. a month interest would be unreasonable as damages in this case.

There appears to be no reason why Robertson should not have communicated with defendant and claimed this extravagant interest if he intended to enforce it; and having failed to assert a right to it, and not having in any way added it to the amount of the note when he sold it to plaintiff, we think, on the principles laid down in the case referred to in the House of Lords, that the plaintiff should not recover as damages more than at the rate of 6 per cent. per annum from 1st October, 1865, the time this note became due.

Thus—Amount of note.....	\$ 1,000 00
Interest from 1st May to 1st Oct., 5 months at 2 per cent. a month, 10 per cent.....	100 00
Interest on \$1,000 from 1st Oct., 1865, to 9th Oct, 1874, 9 years and 9 days, at 6 per cent.....	541 44
	<hr/>
	\$1,641 44

The verdict should be reduced to \$1,641.44.

*Judgment accordingly.*

## GRIFFIN V. THE CORPORATION OF THE CITY OF HAMILTON.

*Division Court.*

There is no obligation upon a municipality to provide an office for the Clerk of the Division Court.

APPEAL from the County Court of the County of Wentworth.

Action on the common counts for money paid by the plaintiff for rent of an office in which to conduct his business of Division Court Clerk of the township of Barton and city of Hamilton.

The facts sufficiently appear from the evidence of the plaintiff, which was as follows:—

I am Clerk of the First Division Court of the County of Wentworth, and have been so prior to the 29th March, 1873, to the present time. I have jurisdiction over the township of Barton and city of Hamilton. I hold my office in the upper flat of the county buildings. I have been Clerk for the last seven or eight years. I pay \$40 a year rent for office to the County Treasurer. I have to pay for fuel and light—it would cost from \$15 to \$16 a year. I am open to the public from 10 to 4 p.m., and of an evening. I issue summonses, process of the Court, and the ordinary routine of the business except the hearing of the causes. I was holding office on 29th March, 1873, to date, 11th May, 1875. I pay my rent annually. I sent in the account to the city clerk. I got a note from him to say my application was refused—my rent for that period is \$86 and \$30 for fuel.

*Cross-examined:* My first and only claim was made in February last. I never had asked the city for an office—my last rent of \$40 was paid on 29th May; it was for the year 1874, up to the 31st December. The Courts have been held at the Court-house, in the County Council Chamber, and sometimes in the City Hall. I have never been obliged to provide a Court-room for holding the Court. I have not paid nor been called upon to pay anything for a

court room. The sittings of the Court have never been held in the office, the rent of which I now claim.

*Re-examined*: I am bound to keep procedure books, which are in constant use, and which are in the office for which I claim rent.

At the close of this evidence leave was granted to move for a nonsuit on any grounds.

Evidence was then gone into for the defence, and a verdict was given for defendants, and leave reserved to move against it.

In July term the verdict was moved against and the rule refused.

From this judgment the plaintiffs appealed, on the grounds:—

1. The defendants are by law bound to furnish and provide for the plaintiff, being Clerk of the First Division Court of the County of Wentworth, a Court-room and other necessary accommodation for holding the said Court; and having made default in doing so, the plaintiff was entitled to maintain this action to recover the moneys and expenses paid and incurred by him in providing and furnishing such Court-room and other necessary accommodation.

The appeal was argued in this term, November 22, 1875. *B. B. Osler* for the appeal. 36 Vic. ch. 48, sec. 362, directs that the municipality shall furnish Court-rooms and "other necessary accommodation." These words clearly cover such an office as is here contended for. The exception in sec. 359, "other than Division Courts," is not applicable since these Courts became Courts of Record. The clerk's duties are such as to require him to perform judicial duties; he is required to assess damages, and the Court is thus in constant session. He referred to *Lees v. Corporation of the County of Carleton*, 33 U. C. R. 409; 32 Vic. ch. 23, secs. 1, 2, O.

*MacKelcan* contra. There is no common law liability to provide the office, and the section referred to only con-

templates a Court-room. The clerk is paid by fees, and generally has one or more employments other than his clerkship, and his place of office may be fixed by the Judge and changed by him, so that if the defendants did provide an office the Judge might order the defendant elsewhere. He referred to 37 Vic. ch. 7, sec. 72, O.

December 23, 1875. MORRISON, J.—The question raised by this appeal is, whether there is a duty cast on the municipality to provide an office for the use of a Clerk of a Division Court.

By 36 Vic. ch. 48, sec. 359, the Municipal Institutions' Act of 1873, it is enacted that the County Council shall "provide all necessary and proper accommodation \* \* for the Courts of justice other than the Division Courts, and for all officers connected with such Courts."

And sec. 362 provides: "The municipality in which a Division Court is held shall furnish a Court-room and other necessary accommodation for holding said Court, not in connection with any hotel."

This section makes no provision or reference to the clerks or other officers of the Courts, as mentioned, in the preceding section 359.

And by 37 Vic., ch. 7, sec. 72, "The Administration of Justice Act," it is provided: "In case a proper Court-room, and other necessary accommodation for the holding of the Division Court are not furnished by the municipality in which the Court is held, the Judge may hold the Court in any suitable place in the division, or in any other division of the county in which suitable accommodation is provided; and the owner \* \* of the building in which the Court is so held, shall for the use of the said building be entitled to receive from the municipality whose duty it was to provide proper accommodation for the Court, the sum of \$5 for every day in which the Court is held in said building." Neither in this section is any reference made to the office of the clerk.

It does not appear in any of the statutes that the clerk



shall have an office where the Court is holden; but by Division Court Rule No. 3, approved of January, 1854, and which rule has the force and effect, as if the same had been included in the Division Court Act, "The Clerk of any Division Court shall have an office at such place within the division for which he is clerk as the Judge may direct."

Under this rule it is clear that it is not necessary his office should be at the place where the Court may be held, or in connection with the Court-room. And then again, no provision or reference is made that the municipality shall provide such an office.

I think it is quite evident from these various enactments and the rule I have referred to, that the Legislature never intended, nor did the Judges who framed the rules anticipate, that the municipality or any other body should be bound to find office accommodation for the Clerks of the Division Courts.

The 36 Vic., ch. 48, sec. 362, only provides for a Court-room and other necessary accommodation for holding said Court. The words at the end of the section, "not in connection with any hotel," shews that it was not necessary to have a separate building for the Court, but merely a room and the necessary accommodation for the Judge and those in attendance during the sitting of the Court.

And the 37 Vic., ch. 7, sec. 72, provides for the contingency of the municipality not providing a Court-room, and in such case giving a right to the owner of a building in which the Court may be holden to receive from the municipality \$5 for each day it is there holden.

This provision goes far to negative the assumption that the words "necessary accommodation" include that of the clerk's office, the office itself being one of a permanent character and its place being fixed at the discretion of the Judge. We were referred by counsel to the meaning of the words Court-room, &c. It is quite unnecessary to enter upon any philological discussion of the matter, when we can plainly see the object the Legislature had in view. On the whole, and in the absence of any express provision

declaring it to be the duty of the municipality to provide office accommodation for the Clerk, we are of opinion that this appeal must be dismissed with costs.

WILSON, J.—I am of opinion it is the duty of the municipality in which the Division Court is held to furnish a Court-room and other necessary accommodation for holding the Court.

By 36 Vic., ch. 48, sec. 362, it is plainly not the duty of the County Council to do so, nor can any part of the Court-house be required for that purpose : Sec. 359 of the same Act.

If the municipality in which the Court is held do not furnish a Court-room, &c., the Judge may hold the Court in any suitable place in the division, or in any other division in the county in which suitable accommodation is provided.

I think an action will not lie against the municipality in which the Division Court is held by the clerk of the Court for the money he has paid for the necessary accommodation for his office. There is no provision made for such a case.

For many years, until 1846, I think, the Registrars of counties had to furnish their own offices.

The appeal must be dismissed with costs.

HARRISON, C. J., took no part in the judgment, not having been present at the argument.

*Appeal dismissed.*

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MEMRANDA.

During this term the following gentlemen were called to the Bar:—

KENNETH GOODMAN, THOMAS HORACE MCGUIRE, GEORGE ARTHUR RADENHURST, EDWIN HAMILTON DICKSON, ALEXANDER FERGUSON, DENNIS AMBROSE O'SULLIVAN.

During this term the following General Rules were read in open Court.

IN THE  
COURT OF QUEEN'S BENCH,  
AND THE  
COURT OF COMMON PLEAS.

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*Michaelmas Term, 39th Victoriæ.*

The business of the Court in term shall be conducted as follows :—

1. Every day in term, the Court shall first hear Motions for Rules by Consent, or which may be had without argument, which shall be called Motions of Course.

2. Motions upon or against any trial, verdict, assessment or non-suit, shall, after the Motions of Course, take precedence of all other business, upon the days now appointed by the Court, or which are allowed by Statute for such purpose, excepting on Paper Days.

3. The *First* Friday, and the *Second* Monday, in the Queen's Bench, and the *First* Saturday, and the *Second* Tuesday, in the Common Pleas, shall be Paper Days; and also, any other day or days, which the Court may, from press of business, or other necessity, from time to time appoint.

4. County Court and Controverted Election Appeals shall be set down for hearing, as at present, on the first and second of such Paper Days, and Appeals or re-hearings from the decision of a single Judge, sitting for the full Court, and Crown Cases reserved, shall be set down on any Paper Day of the term.

5. On the last day of term, after Motions of Course have been taken, other general business may be proceeded with, but no case involving argument, unless affecting personal liberty, shall be heard, without the leave of the Court.



6. Upon other days in term, than those already mentioned and provided for, the business shall be proceeded with as follows :—

1. Motions of Course.

2. Motions for Rules Nisi, on special motions.

3. The cases on the Peremptory List, in the order in which they are entered.

7. After the special business on any day is over, the Court may take any other matter, in which the parties are prepared to proceed.

8. Every Rule, Demurrer, and Special Case to be heard by the full Court, shall, before argument, be entered by the Master on a General List, in its order, as set down by either party ; and no such case shall be heard which is not so entered, unless by special order of the Court.

9. Eight cases, in the order of their priority, on the General List, shall be set down by the Master in the Peremptory List for argument, on each day in term, excepting on Paper Days and upon the last Saturday, and no argument shall be heard in any other case, until the cases in the Peremptory List for the day are disposed of.

10. Any case on the General List, may be heard on any day, by consent, and by leave of the Court.

11. Any case entered on the Peremptory List for any day, and postponed by order, or by default, shall be placed at the foot of the General List, unless, for sufficient cause, it shall be otherwise specially ordered by the Court.

12. If either party to a case on the Peremptory List, is prepared to be heard and the other party is not prepared, and it is not duly postponed as aforesaid, the Court may hear the party so prepared, whereupon the case shall stand for judgment ; or the Court may extend the time on sufficient cause being shewn by affidavit, to enable the other party to be heard, on payment of the costs of the day, if the Court shall so order. If neither party to a case on the Peremptory List is ready, the Court may, if it see fit, strike the case out of the list.

13. If all the cases on the Peremptory List for any day, are not disposed of on that day, such cases shall be entered by the

Master first on the Peremptory List for the next day, as part of the eight cases, for such next day.

14. In case it is required, in the opinion of the Court, for the more convenient and expeditious disposal of business, that a change should be made in the above Rules, for the hearing of any particular matters, the same shall be made from time to time as may be necessary to meet the emergency, as in matters relating to Contempts of Court, or to Attorneys, or to Writs of Habeas Corpus, or other proceedings affecting personal liberty ; or to any other matter or business of the Court.

15. The present list of Cases for Argument in Court shall remain as it is, and be the General List of Cases, under these Rules.

16. Nothing in these Rules contained, shall affect any priority which the Court has customarily granted to the Attorney-General, of moving, when he comes into Court.

17. These Rules shall come into force, on and after Monday, 22nd November, 1875, and all Rules heretofore made, which are inconsistent with the above Rules, are hereby repealed.

Dated 17th November, 1875.

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*Michaelmas Term, 39th Victoria.*

IT IS ORDERED AS FOLLOWS :

1. Every Rule Nisi to rescind the order of a Judge or Clerk of the Court sitting in Chambers shall be set down to be heard on a Paper Day in term, or on such other day as the Court may specially order.

2. It shall not hereafter be necessary to enlarge from one term to another any Rule, Demurrer or Special Case entered by the Master on the General List.

Dated Wednesday, 1st December, 1875.

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*Michaelmas Term, 39th Victoria.*

IT IS ORDERED AS FOLLOWS :

1. In all causes where the Record is duly entered for Trial at the Court of Assize and Nisi Prius, it shall be deemed to be entered and remain on the list of Causes for Trial, until it is tried or otherwise disposed of, either at the Court at or for which it is entered, or at a subsequent Court.

2. If any records entered for Trial, be not tried or otherwise disposed of at any particular Court of Assize and Nisi Prius, they shall, unless the Court otherwise order, be made Remanets, and as such, stand at the head of the List of Causes for Trial at the next ensuing Court, and so from Court to Court, till tried or otherwise disposed of.

3. In the case of Remanets, no Notice of Trial or Assessment, other than the first or original Notice of Trial or Assessment, shall be given or necessary.

4. The Party entering the Record for Trial or Assessment may, after the close of the first or any subsequent Court, countermand his Notice of Trial or Assessment, by giving a Written Notice of Countermand to the opposite party, and to the Clerk of the Court of Assize and Nisi Prius, at least ten days before the ensuing Court.

5. A List of Causes entered for Trial shall, on the first day of each Court of Assize and Nisi Prius, be posted up by the Clerk of the Court in some conspicuous place in or near the Court-room, there to remain during the whole time of each Court of Assize and Nisi Prius.

6. It shall be the duty of the Clerk of the Court from time to time, as each cause on the list is tried or otherwise disposed of, to strike the same from the List or make other necessary entry as to the same.

Dated Saturday, December 4th, 1875.

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## SITTINGS IN VACATION,

AFTER MICHAELMAS TERM.

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IN RE THE NIAGARA HIGH SCHOOL BOARD AND THE  
TOWNSHIP OF NIAGARA, AND THE REEVE, &C., OF  
THE SAID TOWNSHIP.

*High schools—37 Vic., ch. 27, O.*

*Held*, under 37 Vic., ch. 27, O., that the High School Board for a district consisting of two municipalities, a town and township, could call upon one of the municipalities, the township, to contribute towards the erection of a school-house in the other municipality, and not merely towards its maintenance.

IN Michaelmas term *James A. Miller* obtained a rule calling on the parties above named to shew cause why a writ of mandamus should not issue, commanding them forthwith to raise the sum of \$2008.47, the amount or proportion required to be raised and paid by the said township for the purpose of providing for school accommodation for the Niagara High School, as required by the demand of the said Board, in pursuance of the powers given to them by The Consolidated High School Act of 1874.

*McMichael*, Q. C., shewed cause. The township can only be called upon to assist in the maintenance of the school, as the school house is not in the township. The municipality in which the school house is, must provide the school accommodation: 37 Vic. ch. 27, sec. 45.

*J. A. Miller*, contra. 37 Vic. ch. 27, secs. 38, 39, 40, 41, 43 and 46, shew that High School districts may be formed, the municipalities comprising which will be responsible both for school maintenance and accommodation. He referred also to secs. 42, 61, 66 *et seq.*



January 7, 1876. WILSON, J.—The question is, whether the High School Board for a district, consisting of two municipalities, the town and the township of Niagara, can call upon one of the municipalities to contribute towards the erection of a school-house which is built, or is to be built, in the other municipality?

The statute in question is the 37 Vic., ch. 27. The applicants rely on the 46th section chiefly, which enacts that "The council of any municipality, or the councils of the respective municipalities, out of which the whole or part of such High School Districts is formed, shall, upon the application of the High School Board, raise the proportion required to be paid by such municipality or part of the municipality, from the whole or part of the municipality, as the case may be."

That section certainly assumes that a High School District may be formed out of respective municipalities; and secs. 38, 39, 40, 41, 43 directly sanction and assume also that a High School District may be so formed.

It was contended also by the counsel for the township, that as the school-house is not in the township, but in the town, the township can be called on by the board to contribute towards the *maintenance* only of the High School, and not towards its maintenance *and accommodation*.

The Act provides for cities, and for towns separated for municipal purposes from the county, being counties by themselves, for all High School purposes: sec. 42.

A town separated from a county may also have attached to it the whole or any part of any adjoining township or townships "so as to form a High School District; and the whole of such district shall be within the jurisdiction of the Town Council and High School Board for all High School purposes": sec. 43.

By sec. 44 provision is then made for the accommodation and support of High Schools in cities, or in towns withdrawn from the jurisdiction of the county.

Then follows sec. 45, upon which the township contends for exemption from liability for providing for the *accommo-*

*lation* of the High School. It reads as follows:—"In the case of a High School in a town not withdrawn from the county, or in an incorporated village or township, one half of the amount paid by the Government, shall be paid by the municipal council of the county in which such High School or Collegiate Institute is situated, upon the application of the High School Board; and such other sums as may be required for the maintenance and school accommodation of the said High School, shall be raised by the council of the municipality in which the High School is situated, upon the application of the High School Board; or, in the event of the county council forming the whole or part of a county into one or more High School District, then such other sums as may be required for the maintenance of the said High School shall be provided by the High School District, upon the application of the High School Board; such sums shall be raised in the manner provided in the next section."

The next section is the 46th section, before given.

By the 45th section, which applies to a High School in a town not withdrawn from the county, or in an incorporated village or township, reference is made to those sections of the Act, from 66 to 71, by which the Government is to pay certain sums, but which do not apply to building of school-houses. Then the county council pays at least one half of the amount which the Government pays. Then follows the portion of the section which creates the contention: "And such other sums as may be required for the maintenance and school accommodation of the said High School shall be raised by the council of the municipality in which the High School is situated." That assumes that the High School District is coterminous with the municipality in which the High School is situated. If that was not so it would be at variance with the 46th and other sections of the Act, and be more particularly at variance with what immediately follows the last quotation as part of the same (45th) section: "Or in the event of the county council forming the whole or part of a county into one or more

High School Districts, then such other sums as may be required for the maintenance of the said High School shall be provided by the High School District, upon the application of the High School Board. Such sums shall be raised in the manner provided in the next section."

The two cases provided for by this section are, that such other sums which are "required for the maintenance and school accommodation of the said High School" beyond the amount which the Government and county council contribute, is to be raised by the council of the municipality "in which the High School is situated,"—that is, as I construe the Act, in case the High School District is coterminous with the municipality in which the High School is situated.

The language is not, I admit, very precise, and it may be said it is improbable that a town not separated from a county, or an incorporated village, or a township, will alone constitute a High School District.

The other case is, that in the event of the county council forming the whole "or part of a county" into one or more High School Districts, "then such other sums," that is, besides those the Government and county council contribute, shall be provided by the High School District, "as may be required for the maintenance of the said High School," omitting the words "and school accommodation," as in the previous part of the section—which omission I look upon as an inadvertency, and not as intentional, and which omission is sufficiently supplied so as to add the burden of school accommodation to that of maintenance, if the word maintenance be thought not to include both terms.

It never could have been intended that the municipality in which the High School stands should build, at its own expense, the High School for a larger district, in which other municipalities should participate equally without contributing more than its share of the maintenance of the building, and the small proportion which should fall upon it as the one-fourth part of the charges which the Government and county did not pay.

The same section says that in the event last mentioned, just as has happened, two municipalities, part of a county,

formed into a High School District, "such sums shall be raised in the manner provided in the next section."

And that next section provides that the councils of the municipalities shall "raise the proportion required" by the High School Board by each municipality. That *proportion*, it was argued on behalf of the township, meant its proportion for *maintenance* only.

I think it does not. The meaning is a proportionate part of the total sum required for the district. And section 61, sub-sec. 6 (a) shews that.

On a just consideration of the purpose and intent of the Act, and of the different provisions affecting this question, I am of opinion the township of Niagara is bound to contribute towards the maintenance and school accommodation of the High School erected in the district of which the township forms a part, although the High School is situated in the town of Niagara, and that the rule must be made absolute for a mandamus to issue as moved for.

*Rule absolute.*

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IN THE MATTER OF THE PUBLIC SCHOOL TRUSTEES OF  
SECTION NO. 6, IN THE TOWNSHIP OF SOUTH  
FREDERICKSBURGH, IN THE COUNTY OF LENNOX  
AND ADDINGTON, AND THE CORPORATION OF THE  
TOWNSHIP OF SOUTH FREDERICKSBURGH.

*School trustees—Application for mandamus to levy rate.*

The trustees of a township school section sent to one of the councillors a notice signed by them, addressed to the reeve and councillors of the township, as follows: "Gentlemen,—You will please levy the sum of \$460 on the ratable property of school section No. 6, South Fredericksburgh, for the school purposes of said school section." This notice had no date. It was handed to one of the councillors, and the affidavits were contradictory as to its having been formally presented to the council, but the trustees were informed that the council would not act upon it, as it had no date.

*Held*, that such an application should be made through the township clerk: that the demand for a lump sum, simply for the school purposes of the section, is insufficient, for the corporation have a right to know particularly the purposes for which the money is required; and *semble*, that the absence of a date would alone have been a fatal objection.

A mandamus to compel the corporation to levy the amount was therefore refused, but as the affidavits filed on shewing cause were unnecessarily long, the corporation were allowed only half their costs.

In Michaelmas term, November 18, 1875, W. A. Reeve, obtained from Wilson, J., a rule *nisi*, calling upon the corporation to shew cause why a writ of mandamus should not issue to the corporation, commanding them to levy by assessment on the taxable property in the said section the sum of \$460, required for the school purposes of said section, pursuant to the application of the said public school trustees to the said corporation, at its meeting in August last; and why the corporation should not pay the costs of the application.

In support of the application, affidavits of each of the three trustees were filed, from which it appeared that on the 26th of August, 1875, the trustees, at a regular meeting, after discussion, determined that \$460 was necessary, over and above the funds then on hand, to defray the usual and current expenses of the school for the current year, besides paying for the erection of a wood-shed erected during the year. The wood-shed cost \$40, and the balance was intended to meet teacher's salary, fuel, and minor incidental

expenses. The trustees thereupon decided to apply to the corporation to raise that sum, and a notice in writing was drawn up with that view, and given to one of the councillors, Mr. Ball, to lay before the council at its next meeting. The council met on the 28th of August, and the trustees afterwards were informed that the council did not consider the notice legal, as it had no date, and refused to act upon it.

The notice was as follows :—

“To the Honorable Reeve and Councillors of the township of South Fredericksburgh, Co. of Lennox and Addington.

“Gentlemen,—

“You will please levy the sum of four hundred and sixty dollars on the ratable property of School Section No. 6, South Fredericksburgh, for the School purposes of said School Section. Yours, &c.,

“PETER BRISTOL	} Trustees
“WM. F. GAMON	
“A. O. FRASER.”	
	S. S. 6, S. F.
	[C.S.]”

On behalf of the council, the affidavit of Mr. Ball, the councillor to whom the notice was given, stated that the notice was given to him by a boy about 10 or 12 years of age, son of a trustee, without any request to present it to the council, or any instructions as to what he was to do with it: that he had it at the meeting, where some of the members of the council saw it privately, but he never presented it to the council, and the council were never in fact asked to provide the money, nor was any note of the application entered on the minutes. A copy of the minutes, filed by the trustees, shewed that no note was entered of the application.

Other affidavits were filed by the trustees and the council, on the one hand with reference to statements made by Ball at public meetings and elsewhere, that he had presented the notice, and on the other hand denying that he had made any such statements.

January, 11, 1876, *Delamere* shewed cause. The affidavits shew that the notice never was presented to the council even informally. To be effectual it should be presented through the township clerk. The want of a date is also relied on. It is also defective in not giving the particulars for which the money is required.

*F. Osler*, contra. On the affidavits it is contended that Ball did in fact present the notice, and the council were aware of it, and should be bound as much as if it had been formally presented. It must be presumed that the sum was required for the expenses of the current year, and the absence of the date is of no consequence.

January 18, 1876. HAGARTY, C. J. C. P.—I have read over all the papers filed.

I think the application should have been made to the council through the township clerk, their proper organ. Had this course been taken all the present difficulty might have been avoided. The clerk has fixed statutable duties, and is responsible for the custody and management of all papers, and of the minutes of the proceedings of the council.

Had the council, as the applicants insist, only objected to the requisition because it wanted a date, there would perhaps have been a strong ground for objecting on that score alone.

I do not read the Act of 1874 as permitting a requisition of a single sum of money simply "for the school purposes of the section." I think the council have a right to know what these purposes are. 37 Vic., ch. 28, sec. 46, directs the council to levy, &c., such sum as may be required by the trustees thereof for the purchase of a school site, the erection, &c., of a school-house, &c., &c., (specifying several matters), and salary of the teacher, assistant or monitor, as may be determined by such trustees.

Sec. 47 enacts that the council shall not levy during any one year more than one school section rate, except for the purchase of a school site, or erection of a school house, &c.

This shews the importance of seeing for which year and for what purposes this money is required.

On this requisition there is no date whatever, nor any statement of the year or the purposes for which the money is required.

Sec. 26, sub-sec. 14, directs the trustees to apply to the township council for the levying and collecting by rate, &c., all sums for the support of their schools, purchase of site, &c., and for any other school purpose authorized by this Act

I hold that the council of the township has a right to know the purposes for which the money is required by the school trustees.

The case of *In re Port Rowan High School*, in 23 C. P. 11, was on a different Act, and was not the case of a public school.

As to costs. I think the township council either never had the requisition presented to them, or if they rejected it, it was so insufficient that it ought not to have been acted on without explanation and date. I think they ought to be allowed some costs. But as they have followed the evil example of the applicants in indulging in a quantity of useless statements, I direct that only half the costs of their affidavits be taxed to them.

As to the applicants, they have run into the most extravagant exuberance of affidavit.

*Rule discharged.*



## STEWART V. BEATTIE.

*Award—Mistake—Reference back.*

An arbitrator intended to award that the costs of the reference and award, as well as of the cause, should be paid by the defendant; but by the mistake of the clerk of the plaintiff's attorney, by whom the award was drawn, the costs of the reference and award were omitted. The award was remitted back for correction, but on payment of costs by the plaintiff, as the mistake was not that of the arbitrator only.

The delay in moving from the 21st of August, when the award was made, until the 4th of December, was held sufficiently accounted for by the loss of the *Nisi Prius* record and submission.

*F. Osler* obtained a rule calling on the defendant to shew cause why the award should not be remitted to the arbitrator, who had omitted to award upon the costs of the reference and award.

The costs were said to amount to \$97.80. The costs of the cause were to abide the event, and the costs of the reference and award were to be in the discretion of the arbitrator, and the award made no mention of such latter costs. The arbitrator made oath that that he fully intended that the costs of the reference and award, as well as the costs of the suit, should be paid by the defendant; but by some oversight he omitted to mention and declare in the award that the defendant should pay such costs.

*Strathy* shewed cause. He argued that the arbitrator had in fact pronounced as to such costs by not awarding them: that the motion should have been made within the time limited by the C. L. P. Act, secs. 160, 165: *Doe d. Banks v. Holmes*, 12 Q. B. 951: that the award could only be sent back in cases in which the Court would formerly have set it aside; and the lapse of time was too great to authorize the award being now sent back—it was made on the 21st of August, and the motion was not made till the 4th of December: that the mistake, if one there was, were not that of the arbitrator, but of the plaintiff's attorney, as the award was drawn up in his office.

*F. Osler* supported the rule. The case cited on moving for the rule to shew cause, of *Connor v. McCormack*, 23 C. P.

271, shews there is no fixed time for moving in this case, and the delay has been accounted for; the *nisi prius* record and the submission to a reference made by order of *nisi prius* were lost by the arbitrator, and after a vain search to find them copies had to be made, and the verdict taken at the trial endorsed upon it, which occupied a considerable time.

January 7th, 1876. WILSON, J.—I think I should refer the matter to the arbitrator to amend his award as desired. But as the plaintiff's attorney has said in his affidavit "that the award which was made in this cause was drawn by my clerk, who inadvertently omitted to mention that the costs of the reference, as well as the award, were to be borne by the defendant, as was the intention of the arbitrator," relief can be given only upon the general rule, that when one party to a cause applies for relief against his own mistake, he must pay the costs to which the other party is put by means of that mistake.

If the mistake had been that of the arbitrator only, there should have been no costs of this motion to either party.

Rule absolute referring back the award to the arbitrator, and enlarging the time for making such award for two weeks after the issuing of the rule for that purpose; and that the plaintiff do pay to the defendant, to be set off against the costs in this cause, the defendant's costs of opposing this application. And if the plaintiff do not accept of the rule now ordered, that the rule to shew cause be discharged with costs.

*Rule accordingly.*

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## REGINA V. WILLIAMS ET AL.

*Conviction—Statement of time and place.*

A conviction for keeping a house of ill-fame on the 11th of October, and on other days and times before that day: *Held*, sufficiently certain as to the time.

The information described the parties as of the township of East Whitby, and had "county of Ontatio" in the margin. It charged that they kept a house of ill-fame, but did not expressly allege that they did so in that township or county. The evidence, however, shewed that their place, at which such house was kept, was in East Whitby, in which the justices had jurisdiction. *Held*, sufficient.

A *certiorari* to remove the conviction was therefore refused.

IN Michaelmas term *F. Osler*, upon notice served on the convicting magistrates Reuben Hernden and Loren Foster, moved for a rule upon them to shew cause why a writ of *certiorari* should not be issued to the said justices to send up the conviction of the defendants, and all matters and things and papers connected therewith, in order that the same might be quashed on the ground of illegality.

The parties were charged with and convicted of keeping a bawdy house. He urged that the information does not state where the offence was committed, so that it does not appear the justices had jurisdiction over the parties: that the depositions do not shew the parties kept a house of ill-fame: that the conviction does not state certainly the time when the offence was committed; the time is stated to have been on the 11th of October, and on certain days and times before that day. He cited *Paley* on Convictions, 5th ed. 189, 190; *Onley v. Gee*, 30 L. J. Mag. Cas. 222; 37 Vic., ch. 43, D., 32-33 Vic., ch. 28, D.

December 17, 1875. *Smith* (of Whitby) opposed the application on behalf of the justices. The information states the county in the margin, and the defendants' residence is shewn to be in East Whitby. The time is stated to have been the 11th of October. The depositions shew plainly the parties kept a house of ill-fame. The 32-33 Vic., ch. 28, D., is the Act under which the conviction was made.

January 7, 1876. WILSON, J.—The date of the conviction is, I think, sufficient—that the parties did, on the 11th of October, and on other days and times before that, keep and maintain a certain bawdy house or house of ill-fame contrary to the statute; for the only offence charged by these words is keeping and maintaining a bawdy house or house of ill-fame; and the fact that they kept and maintained such a house on the 11th of October, and on other days and times before that, does not constitute a distinct offence against these parties upon each of these days.

*Onley v. Gee*, 30 L. J. Mag. Cas. 222, 7 Jur. N. S. 570, is quite in point. The general form of indictment alleges the offence always in the like form, as on a certain day and on divers other days and times.

The information describes the parties as of the township of East Whitby, and it has “County of Ontario” in the margin; and although, among other things, it does allege they kept a bawdy house or house of ill-fame, it does not in so many words allege that they did so in the township of East Whitby or in the county of Ontario.

The Dominion Act 32–33 Vic., ch. 28, does not require the information to be in writing. See also ch. 31, sec. 20.

By the last mentioned Act, sec. 5, no objection is to be allowed to any information for any alleged defect therein, in substance or in form.

And by section 21 no variance between the information and the evidence, as to the place in which the offence is alleged to have been committed, shall be deemed to be material if it be proved to have been committed within the jurisdiction of the justices by whom the information is heard and determined.

The evidence shews throughout that the defendants kept a bawdy house at their place, and that place, by the evidence, is said to have been in East Whitby, in which township it appears the justices had jurisdiction.

I think I must decline to grant the rule.

*Rule refused.*



IN RE FORD V. F. F. M'ARTHUR, MAYOR OF THE TOWN  
OF BOWMANVILLE.*Hawkers and peddlers—Effect license.*

*Quære*, whether the license to a hawker and peddler, granted under the Municipal Acts, is confined to the licensee only, or whether it extends to a servant employed by him. *Seemle*, that it is personal only; but the point being doubtful, a *certiorari* was granted to remove the conviction of the servant in order that it might be moved against.

On the 1st of December, 1875, *F. Osler* moved before Wilson, J., sitting alone, for a writ of *certiorari* to remove the conviction of Ford and the papers connected therewith, in order that a motion might thereafter be made to quash the conviction.

The facts were that one George H. Pedlar, who described himself as "of the village of Oshawa, in the County of Ontario, Esquire," was the holder of a license said to be marked C. (but not filed), issued to Pedlar, under the by-law of the town of Bowmanville, passed on the 9th of June, 1869, "for licensing, regulating, and governing hawkers, peddlers, and other persons," by which he was authorized to trade as a hawker and peddler.

John Ford, who was represented by Pedlar to have been "at the time of, previous thereto, and now is a servant employed by me, and paid by me, was when so convicted acting as my servant and subject to my orders, so that if not obedient to my commands I could at once dismiss him from my service:" that "when so convicted and previous thereto, he was driving a horse and cart owned by me, and such cart had conspicuously painted in prominent letters thereon my (*i. e.* Pedlar's) name and address:" and "when so arrested the said Ford was travelling and peddling my goods as aforesaid, and was so using my cart and horse."

Ford said he had the license of his employer with him when so arrested, and he shewed it to Coleman, who was the police officer who arrested him, and Ford told him he was merely Pedlar's servant, and that he was only peddling for him, but the constable told him "such license was of no avail, as I must have a license of my own."

The conviction was for hawking and peddling, as the servant of the licensee, his employer's goods in his employer's cart and drawn with his employer's horse, under the license in the name of his employer, and having no license in Ford's own name for the purpose.

January 7, 1876. WILSON, J.—The question is, whether the servant of the licensee can hawk and peddle his employer's goods in the manner represented under his employer's license, in like manner as the licensee could if he were the person actually present and making such sales.

The Municipal Act in force at the time when the by-law was passed was the one of 1866, ch. 51; and sec. 286, sub-sec. 3, as amended by 31 Vic., ch. 30, sec. 31, is the one applicable here. It is substantially like the Municipal Act of 1873, sec. 383, sub-sec. 3, which was the enactment that was in force at the time of the conviction.

That provision speaks of "licensing, regulating, and governing hawkers or petty chapmen, and other persons carrying on petty trades, who have not become permanent residents in the county, city, or town, or who go from place to place to other men's houses on foot, or with any animal bearing or drawing any goods, wares, or merchandize for sale; and for fixing the sum to be paid for a license for exercising such calling within the county, city, or town, and the time the license shall be in force, and for providing the clerk of the municipality with licenses in this and the previous sections mentioned for sale to parties applying for the same in the township, under such regulations as may be prescribed in such by-law. But no duty shall be imposed for hawking or peddling any goods, wares, or merchandise, the growth, produce, or manufacture of this province, not being liquors, within the meaning of the law relating to taverns or tavern licenses."

The Imperial Act, 50 Geo. III., ch. 41, sec. 6, was somewhat like our own enactment. By sec. 19 of that Act every person trading with a borrowed license was subject to a penalty, excepting servants travelling for a licensed master with the master's license and for his benefit.

In *Rex v. Turner*, 4 B. & Ald. 510, 512, it is said by counsel that the exception contained in the 19th section shews that the Legislature considered that a stipendiary servant would be subject to the penalty as a trading person within the 6th section if he travelled without a license.

In *Hodgson q. t. v. Flower*, 2 Camp. 288, which was an action to recover a penalty for the defendant letting out to hire and lending the license granted to the defendant as a hawker and peddler to one Worby, it appeared Worby was the defendant's servant and paid for so selling, and it was held that the defendant had not let to hire the license, because he got no hire for parting with it, nor did he hire it, because Worby himself was hired, nor was it a lending, because Worby had it not for his own benefit but for his master's business.

Lord Ellenborough, C. J., said p. 291, "Perhaps the license was no protection to him, and in that case he might have been prosecuted for trading as a hawker, without, or under colour of a license; but I clearly think that no forfeiture has been incurred by the defendant. The certificate certainly looks as if the Legislature had meant that the license should be personal; but this conjecture cannot extend a penal statute beyond the limits pointed out by the enacting clause, or render the delivery of the license to be used for the benefit of the owner a lending or letting to hire."

In *Attorney-General v. Tongue*, 12 Pri. 51, 60, Graham B. said: "The object of the Legislature in passing the Act \* \* was to protect, on the one hand, fair traders, particularly established shopkeepers, resident permanently in towns or other places, and paying rent and taxes there for local privileges, from the mischiefs of being undersold by itinerant persons, to their injury; and on the other, to guard the public from the impositions practised by such persons in the course of their dealings; who, having no known or fixed residence, carry on a trade by means of vending goods conveyed from place to place by horse or cart."

In some cases a license to do a particular act or to enjoy

a privilege must be personal, to be exercised by the licensee only. In other cases the license may be acted upon by another for the licensee's benefit. If one give to another leave to visit his grounds or horses, or to see his pictures, or to use his horse or carriage, or to hunt over his property, it is the donee alone who can exercise such a privilege. He could not send a friend or servant in his stead, any more than he could send the one or the other in his stead on an invitation to himself to dinner. If, however, he asked leave to measure the size of the other's house, or to cut down a tree upon or to take a load of sand from the other's farm, he might send a substitute, as an architect or labourer, according to the nature of the work, to do it for him and for his use.

These would be acts not requiring the personal attention of the donee, and he would be getting by the act of his agent or servant the thing or right which was given. But when the thing granted is from the nature of the request or favour to be done or enjoyed by the donee himself, as in some of the cases before mentioned, there can be no delegation or substitution.

A license, or right, too, may be of such a nature that it may be transferred to another for his own benefit, and may be exercised by him as such transferee, as the right to a seat in the theatre, or in the stand at some public amusement or game, or in a railway car or steamboat, unless it be forbidden by the donor at the time of the license given.

A tavern license, or a hawker's and peddler's license, is not transferable in that manner, unless it is specially permitted, for in the nature of things the right or privilege given is to the individual licensee and not to anybody he may choose to put in his place.

But that does not touch the question, for the licensee in this case did not assign his license; he retained it and exercised the power under it for his own benefit, but through his servant's agency and labour. The tavern-keeper might certainly do that. In case of sickness, or absence, or by reason of some other engagement, he might carry on his



hotel by the services of his wife or children, or agent, or servant, just as he might do it if he were personally present. Then it may be said why may not a hawker or peddler carry on his business by another also? He may be sick or absent, or otherwise employed, and is he not during such time to keep up his business by his wife or children, or agent, or servant, in like manner as an innkeeper? One answer is, that the license to the innkeeper is very often as much for and to the house as to the person who keeps it.

It seems not quite consistent that a person who is an esquire and stays at home should be licensed as a hawker and peddler, to carry on a petty trade by taking round his goods on foot or by vehicle from place to place, and to other men's houses. There is a danger, too, that the actual licensee being well known might go on trading without being asked to produce his license, and the servant or agent by the possession of the license might go on trading too. Two persons certainly could not at the same time trade under a license granted only to one of them. They might travel together, but then the trading of the two would be deemed (if the fact were so) the trading and the business of the licensee only.

The saving inserted in the English Act before referred to seems as if the Legislature had thought the license personal to the licensee only.

I am, on the whole, disposed to think it is; for the person who acts upon it is moving about from place to place, and it might be difficult to tell the different agents and servants of the licensee, while there is no difficulty in knowing the licensee himself. And by this by-law the clerk of the town of Bowmanville is to give notice to the clerks of the other municipalities of the county of the name, designation, and residence of the persons to whom such licenses are granted, and which seems to indicate that the license is to be used by the licensee only. Then there is another reason which has probably much more weight in the same direction, and that is that such kind of trading is not apparently encouraged by the statute, on the ground, as already stated, that

such a privilege is not to the benefit of the permanently settled trader who pays his rent and other local burdens, from many of which the hawker and peddler are free.

I entertain a good deal of doubt on the point, but on the whole I think the conviction is right, still I entertain so much doubt that I should certainly grant the writ, and hear what is to be said on the subject.

*Rule nisi granted.*

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### HAMMOND ET AL. V. CONGER.

*Special plea of fraud—Defence admissible under general issue—Demurrer.*

To a declaration on the common counts for freight, defendant pleaded, on equitable grounds, as to \$368, part of the money claimed, and being the difference between 90 cents and \$1 per ton, that the plaintiffs falsely and fraudulently represented to defendant's agent that defendant had agreed to pay them freight at \$1 per ton, and had chartered their vessel at that rate, whereas defendant had refused to pay them more than 90 cents per ton: that on the faith of such representations the agent delivered to them the coal, and received a bill of lading expressing the freight to be \$1 per ton, and the plaintiffs carried the coal and delivered it to the agent before defendant could forbid them.

*Held*, a good plea on demurrer, though unnecessary, the defence being admissible under never indebted.

**DEMURRER.** Declaration: for money payable by the defendant to the plaintiffs for freight for the conveyance by the plaintiffs for the defendant, at his request, of goods in their ship; and for interest upon money due from the defendant to the plaintiffs, and forborne at interest by the plaintiffs to the defendant at his request.

Third plea, on equitable grounds: except as to \$368, part of the moneys claimed, that the moneys in the declaration mentioned are moneys (and interest thereon), claimed for and in respect of the conveyance by the plaintiffs in their said ship of a quantity, to wit,  $406\frac{3}{2000}$  tons of coal, belonging to, and at the time of the delivery of the same to the plaintiffs to be carried as hereinafter mentioned, being the property and goods of the defendant, from Black River,

in the United States, to Toronto, in Canada; that the plaintiffs before and at the time the said goods were delivered to them by the agent of the defendant at Black River, as hereinafter mentioned, falsely and fraudulently represented to the said agent of the defendant that the defendant had theretofore agreed to pay them freight for the conveyance of the said goods at the rate of one dollar per ton, gold, and that the defendant had chartered the vessel of the plaintiffs at that rate; whereas in truth and in fact the defendant had refused to charter the plaintiffs' vessel, or to pay them freight for the conveyance therein of the said goods at a higher rate than 90 cents per ton, as the plaintiffs then and always before the delivery to them of any of the said goods well knew: that the said agent of the defendant, believing the said representations of the plaintiffs to be true, delivered the said goods upon the said vessel of the plaintiffs, and received from the master of the said vessel a certain shipping bill, or bill of lading, signed by him, wherein the said goods, by and through the fraud of the plaintiffs as aforesaid, were expressed to be deliverable to the defendant subject to payment of freight therefor at the rate of one dollar per ton; and the plaintiffs afterwards, and before the defendant had any opportunity of forbidding them from so doing, conveyed the said coal, then being the coal and goods of the defendant, to Toronto aforesaid, and there delivered the same to the defendant; and that part of the plaintiffs' claim in his plea pleaded to is the difference between the freight mentioned in the said shipping bill or bill of lading and the freight at the said rate of 90 cents per ton and interest thereon.

Demurrer to the plea, on the grounds:—1. That such plea does not allege or shew that the plaintiffs agreed to the rate of 90 cents per ton as the freight, and the facts disclosed in said plea shew that the plaintiffs are at least entitled to recover freight *quantum meruit*, and such being the case the plea shews no facts which fix the rate at 90 cents.

2. That the contract referred to in said plea having been executed, and the defendant having taken the benefit of it,

he cannot now, without shewing that the contract was rescinded by him and the parties placed in *statu quo*, avoid his liability upon the contract, his remedy, if any, being by a cross action.

3. That for all that appears in said plea the defendant accepted delivery of the coal knowing of the alleged fraud, and without repudiating his liability to pay one dollar freight per ton.

4. That the said plea amounts only to the general issue if an answer to the action at all.

Joinder.

January 14, 1876. *Lash* argued the demurrer for the plaintiff.

*F. Osler*, contra.

January 18, 1876. HAGARTY, C. J. C. P.—I cannot understand why the defendants should have been advised to plead this plea; or on the other hand, why the plaintiffs finding it pleaded should have thought proper to demur to it.

The defence could, I think, undoubtedly be urged under never indebted; and it is, I think, to be regretted that leave to plead and demur was granted.

In former times, I think, the plea would have been bad as amounting to the general issue. As it stands it contains matter that if true is a good bar, but was equally admissible as a bar on never indebted.

It can, I think, only be upheld on this ground—that as to the moneys to which it is pleaded the plaintiffs, by the production of the bill of lading stating the freight at a dollar per ton, would *primâ facie* be entitled to be paid at that rate; and defendant answers that by stating that the bill was obtained in that shape by fraud, and therefore is not binding.

As it seems conceded that the mere fact of its amounting to a general issue is not now ground of demurrer, I hold the plea otherwise good.



I see nothing in the point suggested by the plaintiffs, that it embarrasses them by attempting to set up a 90 cent rate. The substantial defence is merely to confess and avoid the bill of lading.

*Judgment for defendant.*

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HILARY TERM, 39 VICTORIA, 1876.

*February 7th to February 26th.*

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*Present :*

THE HON. ROBERT ALEXANDER HARRISON, C.J.

“ JOSEPH CURRAN MORRISON, J.

“ ADAM WILSON, J.

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WAGNER V. MARY LOUISA JEFFERSON.

*Married woman—Liability on contract—35 Vic. c. 16., O.*

A married woman owned land under the will of her father who died in 1865, having devised all his real estate to his widow for life, and on her death to his children in fee. By deed of partition between his daughters, of whom the defendant, who married in 1865, was one, and to which defendant's husband and the widow were parties, certain lots were conveyed to defendant in severalty “to and for her separate use forever.” Defendant's husband employed the plaintiff to build on this land, and the plaintiff rendered his account to the husband, knowing nothing, so far as appeared, of defendant in the matter.

*Held*, that the defendant was not liable; for although the land was her separate estate, it could not be said that this work was done at her request or on her credit, or that there was any contract with her.

DECLARATION: on the common counts: for goods bargained and sold: goods sold and delivered: work done, materials provided for the same, &c.

Pleas: 1. Never indebted. 2. Payment. 3. Coverture. Issue on the first and second pleas.

Replication to the third plea, that the contract or debt in the declaration mentioned was and is the separate debt of the said defendant, Mary Louisa Jefferson, wife of Hugh Jefferson, and was contracted by her for her own benefit, and in respect to her own separate estate.

Issue thereon.

The cause was tried at the last Spring Assizes for the county of York, before Strong, J.

The action was brought for work done and materials provided by the plaintiff, for the real estate of the defendant in the city of Toronto.

The work was done and materials provided on the request of defendant's husband.

The accounts were rendered to him and in his name, not in the name of the defendant.

But there was evidence that the husband was the agent of the defendant for the purpose of ordering the work and materials.

The defendant is the daughter of the late Thomas Coxwell, who was for many years one of the clerks in the Crown office at Toronto.

He made a will, dated April 7, 1865. It was duly executed so as to pass real estate. By it he devised to his widow, Fanny Coxwell, all his real estate, so long as she should remain unmarried and over on her death or marriage, to his children. To her daughters, Elizabeth Coxwell and Mary Louisa Coxwell, after the death or marriage of his wife, he specifically devised lots numbers three and four on the north side of Alice street, in the city of Toronto. To hold to them, their heirs and assigns forever.

Shortly afterwards, during the same year, the testator died, without having revoked or altered his will.

The defendant, Mary Louisa Coxwell, in the same year (1865) married Hugh Jefferson, her present husband.

On 12th November, 1868, there was a deed of partition executed by the daughters and Hugh Jefferson, the husband of the defendant. The widow was a party to it, for the purpose of releasing her estate. By the deed, Elizabeth Coxwell, the sister, granted to the defendant lot four on the north side of Alice street, excepting a small portion thereof, to hold to the defendant in severalty, and, "to and for her own separate use and benefit forever." This was done, as expressed in the deed, "with the full approbation and consent" of the husband testified by his being a party to and executing the deed.

Afterwards the defendant conveyed the lot to the Western Canada Loan and Savings Society, for \$2,800 lent on the security of the property. The money was borrowed for the purpose of building on the land. The work done and materials supplied by the plaintiff were for a like purpose. The work was done and materials provided in 1873.

The counsel for the defence, at the close of the case, moved for a nonsuit on the ground that the statute 35 Vic., ch. 16, only gives a right of action against married women on contracts made in reference to their separate estate: that no separate estate was shewn in this case, and that even if there were separate estate, the contract was not shewn to have been entered into in respect thereof.

There was no ruling on the objections when taken at the close of the plaintiff's case.

The husband of the defendant was then called as a witness for the defendant. He swore that the work was done and materials supplied on his own credit: that he never told the plaintiff for whom he was acting, and that all accounts were rendered in his, the husband's, own name.

The motion for a nonsuit was then renewed on the whole case.

The learned Judge entered a verdict for the plaintiff for \$438.62, the amount of his demand, without noting any particular finding on the facts, and reserved leave to defendant to move to enter a nonsuit on the objections.

In Easter term last, May 20, 1875, *Rose* obtained a rule *nisi*, calling on the plaintiff to shew cause why the verdict should not be set aside and a nonsuit entered, pursuant to leave reserved at the trial.

In Michaelmas term, November 30, 1875, *J. K. Kerr* shewed cause. Under the deed of partition the real estate was the separate estate of the defendant: Consol. Stat. U. C., ch. 73, sec. 1, 14; *Merrick v. Sherwood*, 22 C. P. 467. Her separate estate would be chargeable in equity under what is proved to have taken place here; and if so, the 35 Vic.,



ch. 16, O., gives the remedy by action : *Dingman v. Austin*, 33 U. C. R. 190, 193 ; *Steels v. Hullman*, 33 U. C. R. 471 ; *Haight v. McVeagh*, 11 C. L. J. N. S. 148 ; *Johnson v. Gallagher*, 3 DeG. F. & J. 494 ; *McFarlane v. Murphy*, 21 Grant 80 ; *McCready v. Higgins*, 24 C. P. 133. The husband in what he did was simply the agent of defendant, and the credit given to the husband when the principal was not disclosed does not prevent the plaintiff suing the principal when discovered : *McCandy v. Tuer*, 24 C. P. 101.

*Rose contra.* A married woman can only contract in respect to her separate estate. There was no contract shewn with her in reference to her separate estate. The marriage having taken place in 1868, and the wife then being seized of the estate, the husband acquired an estate or interest in her real estate. This being so, the wife had not a *jus disponendi* independently of her husband, and so there was no separate estate under 35 Vic., ch. 16 : *McCready v. Higgins*, 24 C. P. 233 ; *Dingman v. Austin*, 33 U. C. R. 190.

February 9, 1876. HARRISON, C. J.—If the defendant were a single woman, the action would, on the facts proved, well lie, although the credit was given to the agent, the principal at the time being unknown and having been afterwards discovered : *Paterson v. Gandasequi*, 2 Smith's L. C., 7th ed., 347.

The first enquiry, therefore, is whether, in the present state of our law, a married woman having separate estate is as competent to contract as a single woman.

The case of *Haight v. McVeagh et al.*, reported in 11 C. L. J. N. S. 148, cited by Mr. Kerr, would appear to shew that in the State of Illinois married women are held, under Acts of the Legislature passed in that State, as competent to contract as single women for the purposes of business carried on by them for their own benefit.

If in this Province a married woman has this power, it must be derived either from Consol. Stat. U. C. ch. 73, or from 35 Vic., ch. 16. O.

The primary objects of Consol. Stat. U. C., ch. 73, seem to be: *First*, to protect a married woman in the right to her separate property, free from the debts and control of her husband; *second*, to secure earnings to herself under certain circumstances; *third*, to enable her creditors to obtain satisfaction out of her separate property for debts contracted *dum sola*; and *lastly*, to relieve the husband from liability to such debts: per Draper, C. J., in *Kraemer v. Gless*, 10 C. P. 470, 475.

There is nothing in the Act which, in direct language, enables a married woman to contract as if a single woman.

Mr. Justice Wilson, in *Wright v. Garden et ux.*, 28 U. C. R. 609, was of opinion the Act enabled a married woman to contract in reference to her separate real estate. But this opinion is opposed to the decision of the Court in *Kraemer v. Gless*, 10 C. P. 470, and was not acquiesced in by the majority of the Court in *Wright v. Garden et ux.*

If a married woman has the power to contract absolutely as if a single woman, we must, on the authority of decided cases, go further than the Consol. Stat. U.C., ch. 73, to find the power.

The Imperial Act, 33 & 34 Vic., ch. 93, by section 1, provides that "The wages and earnings of any married woman acquired or gained by her after the passing of this Act in any employment, occupation, or trade in which she is engaged or which she carries on separately from her husband, and also any money or property so acquired by her through the exercise of any literary, artistic, or scientific skill, and all investments of such wages, earnings, money, or property, shall be deemed and taken to be property held and settled to her separate use, independent of any husband to whom she may be married, and her receipts alone shall be a good discharge for such wages, earnings, money, and property."

By section 11 of the same Act, it is provided that 'A married woman may maintain an action in her own name for the recovery of any wages, earnings, money, and property by this Act declared to be her separ-

ate property, or of any property belonging to her before marriage, and which her husband shall, by writing under his hand, have agreed with her shall belong to her after marriage as her separate property, and she shall have in her own name the same remedies, both civil and criminal, against all persons whomsoever for the protection and security of such wages, earnings, money, and property, and of any chattels or other property purchased or obtained by means thereof for her own use, as if such wages, earnings, money, chattels, and property belonged to her as an unmarried woman; and in any indictment or other proceeding it shall be sufficient to allege such wages, earnings, money, chattels, and property to be her property."

Shortly after the passing of this Act the question was raised in England whether a married woman could, under the words of these sections, maintain an action for breach of contract against her bankers. See *Summers v. The City Bank*, L. R. 9 C. P. 580.

The declaration against the defendants contained three counts: 1, for not presenting for payment a bill of exchange deposited with them for that purpose; 2, for not giving notice to the plaintiff of the dishonour of a bill entrusted to them; and 3, for dishonouring a cheque drawn by the plaintiff upon the defendants, the defendants having at the time funds of the plaintiff to meet it.

The defendants pleaded that the plaintiff was a married woman.

The plaintiff replied that the causes of action arose exclusively from earning money, chattels and property within the meaning of the Married Woman's Act, 1870, and that defendants knew, when they accepted her banking account, that she was a married woman, carrying on business separately from her husband.

To this replication the defendants demurred, and the replication was held to be good.

Lord Coleridge, in delivering judgment, said at p. 586: "The question is perhaps not entirely the same on all the three counts. But, to take the third first, it is plain that this sec-

tion of the Act will become almost useless if a married woman, otherwise within its provisions, cannot maintain an action against her bankers for dishonouring her cheque. It does not necessarily follow, because a married woman may sue her banker for dishonouring her cheque, that the general proposition is true without qualification that she can maintain an action for damages for breach of contract.

\* \* \* The first and second counts undoubtedly raise a somewhat broader question, as they are founded upon a contract of agency. But we think the words of the 11th section to which we have referred are sufficient to cover this state of circumstances also. To hold otherwise, would be in effect to say that a married woman could not safely have any of her earnings paid to her by bills of exchange, for that she has no protection against the negligence of the banker to whom she intrusts them. Our decision in favour of the plaintiff under these circumstances must not be taken to affirm, nor will it affirm, the general proposition that under this Act, and without reference to particular circumstances, a married woman can contract."

It is by section 12 of the Married Woman's Act of 1870 also provided that a husband shall not, by reason of any marriage which shall take place after the Act came into operation, be liable for the debts of his wife contracted before marriage; but the wife shall be liable to be sued thereafter, and any property belonging to her separate estate shall be liable to satisfy such debts as if she continued unmarried.

The question shortly after the passing of the Act arose in *Ex parte Holland, In re Heneage*, L. R. 9 Ch. 307, as to whether a married woman so sued could be adjudicated a bankrupt. It was argued that when the section says the married woman may be sued it must be understood that the same consequences should result as in an action against an unmarried woman, with the qualification that her separate property only would be liable, and that it was not necessary to shew that the married woman had separate property.



before obtaining the order; but the Court refused to give effect to the argument.

Sir G. Mellish, in delivering judgment said at p. 311: "I think the Act only makes her liable in respect of her separate property, and I do not see how she can be made a bankrupt unless she has been shewn to have separate property. There are no words in the section which can be made to apply to a woman who has no separate property."

It is clear therefore that under the Married Woman's Act, 1870, the right of a married woman in England to contract is only under the particular circumstances and for the particular purposes mentioned in the Act.

The enquiry now is, whether, under our 35 Vic. ch. 16, O. there are words which either confer the general power on an unmarried woman to contract as if *dum sola*, or subject her to suit on her contracts, when she is not shewn to have any separate property.

The object of the Act, according to its title, is "to extend the rights of property of married women."

The first section in effect abolishes tenancy by the curtesy.

The second section protects the wages and personal earning of a married woman and acquisitions therefrom, and all proceeds or profits from any occupation or trade which she carries on separately from her husband, or derived from any literary artistic or scientific skill.

The third section enables a married woman to insure, for her sole benefit or for the use or benefit of her children, her own life, or, with his consent, the life of her husband.

The fourth section makes provision for insurance by the husband of his life for the benefit of his wife, or of his wife and children.

The fifth section enables a married woman to become a stockholder or member of any bank, insurance company or any other incorporation or association, as fully and effectually as if she were a *feme sole*.

The sixth section enables a married woman to make deposits of money in her own name in any savings or other bank, but by the seventh section deposits in fraud of her husband's creditors are not to be affected by the Act.

The eighth section frees husbands, married after the passing of the Act, from liability for debts of the wife contracted before marriage, and declares that a husband shall not be liable for any debts of his wife in respect of any employment or business in which she is engaged on her own behalf, or in respect of any of her own contracts.

The ninth section provides for suits for and against married women.

These are the proposed objects of the Act.

But at the end of section one are these words: "And any married woman shall be liable *on any contract made by her respecting her real estate, as if she were a feme sole.*" And at the end of section nine are the words: "And any married woman may be sued or proceeded against separately from her husband *in respect of any of her separate debts, engagements, contracts, or torts, as if she were unmarried.*"

In *Merrick v. Sherwood*, 22 C. P. 467, it was contended that the Act 35 Vic., ch. 16, O., only related to contracts specially mentioned in the Act, namely, in respect of the real estate of the married woman, or in respect of any employment or business in which she is engaged on her own behalf, and on this ground a nonsuit was moved, but the Court refused to give so narrow an interpretation to the words used at the end of section nine of the Act.

Mr. Justice Gwynne, in delivering judgment, said at p. 480: "I am of opinion therefore that the plaintiffs in this case are entitled to retain their verdict, although to obtain the fruits of it the Act may possibly prove to be defective, for when the separate estate of a married woman consists of money paid from time to time into her hands by trustees or executors, it may still be necessary to go into equity, to enforce the judgment by decree personally against the trustees or executors through whose hands the money reaches the defendant."

In another part of the judgment he says, at p. 481: "The object of the statute, as it seems to me, being to open to her and *against* her the Courts of law more effectually

than the Courts of Equity had ever been, for there her husband was always a party to the suit."

The opinion of the learned Judge, as I gather from his judgment, is, that wherever a bill will lie in equity to charge the separate estate of a married woman, her husband there being a necessary party, an action will, under the statute, lie in a Court of Law without joining her husband.

In *McGuire v. McGuire*, 23 C. P. 123, it was held that a married woman who had, without any just cause, left her husband's house and was living apart, and had demanded from him chattels and household furniture which, having been her property before marriage, came into his possession upon and by virtue of the marriage, and had been used by them jointly in his dwelling-house, could not, on his refusal to deliver them, maintain trover against him in respect of them; and this, on the ground that the property in respect of which the action was brought was not by any Act declared to be her separate property.

Mr. Justice Gwynne afterwards, in *McCready v. Higgins*, 24 C. P. 237, in referring to *McGuire v. McGuire*, said: "As to the remedies given against her, we decided that the separate debts, engagements, and contracts referred to in the ninth section of 35 Vic., ch. 16, were those debts, engagements, and contracts which, in view of their having been entered into upon the faith and credit of *separate* estate, the Courts of Equity attached upon and satisfied out of such separate estate; and we held that the operation of the ninth section of 35 Vic., ch. 16, so far as concerned remedies against the separate contracts, debts, and engagements of the wife, was *simply* to give a remedy at law to her creditor in addition to the remedy he already had in equity. We did not hold that a married woman had incurred a liability at law in any case wherein the liability in equity did not exist at the time of the passing of the Act. We are not warranted in holding that she is entitled to contract so as to bind herself in any manner not specially declared by the Act."

The Court, therefore, in *McCready et al. v. Higgins*, held that, in the absence of proof of separate estate, the married woman could no more be proceeded against now than before the passing of 35 Vic., ch. 16 ; and made absolute the rule to enter a nonsuit.

If this be a correct exposition of the law, it governs the present case.

I am bound to accept the statement of law by a Court of co-ordinate jurisdiction, unless I am sitting in a case in which there can be no appeal from my decision, and, in the latter case, unless satisfied that the decision is erroneous : See per Cockburn, C. J., in *Reynolds v. Harris*, 3 C. B. N. S. 267, 289 ; per Lord Justice James in *Merry v. Nickalls*, L. R. 7 Ch. 733, 750 ; per Draper, C. J., in *Kerr v. Fullarton*, 10 C. P. 258 ; and per Draper, C. J., in *Haight v. McInnis*, 11 C. P. 523.

I, however, am of opinion that the ruling of the Court of Common Pleas correct.

There is no doubt, as stated by Mr. Justice Wilson in *Wright v. Garden*, 28 U. C. R. 609, 623, that the old policy of the common law, as to the disabilities of married women, is being subverted ; but the process is a gradual one, and has not yet reached the point that the Legislature, in its wisdom, may see fit to push it.

If the Legislature had intended, by the 35 Vic., ch. 16, to enable a married woman, in all respects, to contract like an unmarried woman, they could have said so in a few words ; and if they had said so, there would have been no necessity for the several provisions in that Act, enabling a married woman to contract in particular [cases].

The absence of any general provision of the kind, and the presence in the Act of several provisions enabling her to contract in the particular cases specified, are strong arguments against such a conclusion.

The Legislature has not, I think, either in England or here, yet gone so far as to make a married woman liable on all her contracts without reference to the question whether she has or has not separate estate.



There is, I think, much force in the language of Draper, C. J., in *Kraemer v. Gless*, 10 C. P., 470, 475, where he says : " Every provision for these purposes is a departure from the common law. And so far as is necessary to give these provisions full effect, we must hold the common law is superseded by them. But it is against principle and authority to infringe any further than is necessary for obtaining the full measure of relief or benefit the Act was intended to give."

In construing words which infringe on the common law the state of the law before the passing of the Act must be ascertained, to determine how far it is necessary to alter the law in order to carry out the object of the Act : *Swanton v. Goold*, 9 Ir. C. R. 234.

The general words of a statute are not to be so construed as to alter the previous policy of the law, unless no meaning or sense can be put on the words consistent with preserving the existing policy untouched : *Minet v. Leman*, 20 Beav. 269.

The language of a statute, taken in its plain, ordinary sense, and not its policy or supposed intention, is the safer guide in construing its enactments : *Fordyce v. Bridges*, 1 H. L. C. 1 ; *Phillpott v. President, &c., St. George's Hospital*, 6 H. L. C. 338.

The Court knows nothing of the intention of an Act except from the words in which it is expressed, applied to the facts existing at the time : *Logan v. Earl of Courtown*, 13 Beav. 22.

And although the title is no part of the law : *Rex. v. Williams*, 1 W. Bl. 93, yet the title may be resorted to for the purpose of construing the provisions of the Act : *Hunter v. Nockolds*, 1 Mac. & G. 640.

If there is anything in the provisions of an Act admitting of doubt, the title of the Act is a matter proper to be considered in the interpretation of the Act : *Shaw v. Ruddin*, 9 Ir. C. L. R. 214, ; *Regina v. Guardians &c., of Mallow Union*, 12 Ir. C. L. R. 35.

If the title of the 35 Vic., ch. 16, O., were " to enable a mar-

ried woman to contract as if she were a *feme sole*", I might feel more disposed to give to the words at the end of section 9 a broader interpretation than they have yet received from the Courts, but instead of this I find the title to be "An Act to extend the rights of property of married women."

I am unable to give to the Act any other or broader interpretation than given to it by the Court of Common Pleas in the cases to which I have referred.

The next enquiry is, whether the married woman in this case is proved, at the time of the alleged contract, to have been possessed of separate estate within the meaning of the Acts to which I have referred.

The defendant, before her marriage in 1868, had a vested estate in remainder expectant on an estate of freehold. This she held, until the execution and delivery of the deed of partition, as a tenant in common with her sister. When that deed was executed and delivered, the estate in remainder became an estate in possession. Thereafter the defendant, by the terms of the deed of partition, became and was seized to her own separate use of the parcel of land which is relied on by the plaintiff as separate estate.

The principle of the decisions in equity as to married women contracting in reference to their separate estate is, that a married woman entering into a contract, having separate estate and having as incident a right to dispose of it, and not being personally liable on her contract, is presumed to contract with reference to her separate estate and to intend to charge it. But such presumption cannot arise where she cannot charge her real estate: Per the Chancellor in *Royal Canadian Bank v. Mitchell*, 14 Grant 412, 420.

It is, therefore, of the essence of separate estate that the husband has no estate or interest in it: *Ib.*

The husband at common law takes a freehold interest, during the joint lives of himself and his wife in land belonging to her in fee simple, and such an interest as passes by the deed of the husband alone: *Robertson et al v. Norris*,

11 Q. B. 916. See further, *Allan v. Levesconte*, 15 U. C. R. 9; *Farquharson v. Marrow*, 12 C. P. 311, 313; *Weaver v. Burgess*, 22 C. P. 104.

The first question which now arises is whether the Consol. Stat. U. C. ch. 73, deprives the husband of that interest, so as to make the real estate of the wife the separate estate of the wife, chargeable in equity for her debts contracted in reference thereto.

The Act is intituled "An Act respecting *certain separate rights of property* of married women."

It enacts that "Every woman who has married since the fourth day of May, 1859, or who marries after this Act takes effect, without any marriage contract or settlement, shall and may, notwithstanding her coverture, *have, hold and enjoy* all her real and personal property, whether belonging to her before marriage, or acquired by her by inheritance, devise, bequest or gift, or as next of kin to an intestate, or in any other way after marriage, *free from the debts and obligations of her husband, and from his control or disposition without her consent, in as full and ample a manner as if she continued sole and unmarried,*" &c.: sec. 1.

It enacts that "No conveyance or other act of the wife in respect of her real estate *shall deprive her husband of any estate he may become entitled to as tenant by the curtesy*" : sec. 4.

It enacts that "*Any estate or interest to which a husband may, by virtue of his marriage, be entitled to in the real property of his wife, whether acquired before or after fourth day of May; 1859, or after this Act takes effect, shall not, during her life, be subject to the debts of the husband, &c.*" : sec. 13.

It also enacts that "Every husband who since the said fourth day of May or hereafter *takes any interest* in the separate, real or personal property of his wife, under any contract or settlement on marriage, shall be liable upon the contracts made or debts incurred by her *before* marriage, to the extent or value of *such interest* only, and no more:" sec. 15.

It concludes with the declaration that "Nothing in this

Act contained shall be construed to prevent any antenuptial settlement or contract being made in the same manner and with the same effect as such contract or settlement might be made if this Act had not been passed," &c.: sec. 19.

The statute operates by making a marriage settlement for every woman who, having property of her own, has married since the 4th of May, 1859, without having any marriage contract or settlement : per Draper, C. J., in *Lett v. The Commercial Bank*, 24 U. C. R. 552, 555.

It is not necessary to give a legal definition of what is a marriage settlement. The purpose is to secure a separate estate to the wife, and usually, also, it is made for the benefit of the issue of the marriage, apart from the contract or obligations of the husband ; and this is accomplished, and until the passing of our statute could only have been accomplished, by vesting the estate in some third person as a trustee for the wife or wife and children. The effect of such settlements, as they were commonly framed, and so far as concerns the wife, was to give her substantially the full exercise of all acts of ownership over the estate as if she had been a *feme sole*, and held the property in her own name. By such means she could sell the property, carry on trade with it, or dispose of it by will, because the trustee in whose name the property was vested held it for her use, and was obliged, within the provisions of the settlement, to do himself, and permit her to do, with the property whatever she pleased, and it was altogether exempt by law from the husband's debts. No conveyance or contract which did not permit these or such like powers to be exercised, or which did not preserve at law the estate from the husband, and from his liabilities, and for the wife, apart from her husband—which did not in fact transfer the legal estate to some third person for her—was properly a marriage settlement: per Wilson, J., in *Leys et ux. v. McPherson* 17 C. P. 266, 274.

In *Emrick et al. v. Sullivan*, 25 U. C. R. 105, it was held that, although the Consol. Stat. U. C., ch. 73, enables



a married woman to have, hold, and enjoy her real estate, free from the debts and obligations of her husband, yet it leaves the law as to conveying real estate untouched. See also *Johnston v. McLellan*, 21 C. P. 304.

In the *Royal Canadian Bank v. Mitchell*, 14 Grant, 412, the Chancellor said at pp. 420, 421, the statute gives to the ordinary equitable estate of a married woman "certain qualities for its better protection, which it did not possess before, such qualities being incident to a separate estate, and sufficient probably if found in a private instrument to constitute a separate estate; but that upon a proper construction of the whole Act certain qualities, incident to a separate estate are withheld and what is all important, among them, that quality upon which the decisions making the separate property liable for the married woman's contracts is founded."

In *Balsam et ux. v. Robinson*, 19 C. P. 269, Mr. Justice Gwynne intimated that the object of the statute would be sufficiently secured if it should prove to be that the married woman should not have the power of disposition without the consent and intervention of her husband, so that he may have an interest recognized in law sufficient to enable him to prevent her making what may be improvident bargains in respect of it, and securing to her the same beneficial interest as to the corpus, at least of her personality as she has in her realty.

In *Mitchell v. Weir*,<sup>1</sup> 19 Grant 568, 571, Vice-Chancellor Strong said "The property of the wife, under this Act, is altogether the creature of the statute; and \* \* there is no analogy between the power of disposition of a woman under this statute, and a married woman having separate estate in equity, with no fetter on her power of alienation."

In *McGuire v. McGuire*, 23 C. P. 123, 129, Mr. Justice Gwynne, after quoting section 1 of Consol. Stat. U. C. ch. 73, says, "And the question is, did this clause give to a married woman coming within its purview that absolute power of disposition which a *feme sole* would enjoy, and which a *literal* construction would seem to imply? And

the answer, as it seems to me, is, that other parts of the Act contain internal evidence that by these words the Legislature did not intend to give to her any such absolute *jus disponendi*."

In another place, he says, "What is given is a *jus prolegendi* the property of the wife from the common law power of the husband, without her consent, not a *jus disponendi* upon her without his consent, &c.": *Ib.* p. 130.

In *McCready v. Higgins*, 24 C. P. 233, the Court expressly held that the real estate of a married woman, married before 1859, not settled by any marriage settlement or deed, is not her separate estate, so as to make her liable on a contract made by her on the faith of it, and nonsuited the plaintiff.

Whether the marriage is before or after 1859, so long as it is before 1872, the law is clearly the same under the Consolidated Statute as to the liability of a married woman to be sued on her separate contracts.

In *Dingman v. Austin*, 33 U. C. R. 190, it was held that the first section of 35 Vic., ch. 16, so far as regards the real estate of any married woman, which is owned by her at the time of her marriage, applies only in the case of marriages after the passing of the Act. This decision has been approved in *McCready v. Higgins*, 24 C. P. 233, and *Adams v. Loomis*, 22 Grant 99.

These cases decide that the statute was not meant to divest the husband of any estate or interest acquired in the wife's lands before the passing of the Act.

This concludes all further reference to 35 Vic., ch. 16, sec. 1, so far as the present case is concerned, for the marriage was proved to have taken place in 1868, long before the passing of the Act.

The enquiry, however, remains whether, independently of the statutes, the property of the defendant in this case was not separate estate, so as to give her a disposing power over it. Her estate was not, at the time of her marriage, an estate in possession. It did not become an estate in possession until the execution and delivery of the deed of partition, and that deed was a conveyance to her of the

land for her own separate use, and this with the knowledge and consent of the husband, testified by his being a party to the deed. There can be no curtesy of an estate in reversion expectant on a life interest or other estate of freehold: *Watkins* on Descent, 4th ed. 111, 121, 2 *Black. Com.* 127; *Williams* on Real Property, 11th ed. 226. The husband, therefore, did not at the time of his marriage acquire any estate in the land of his wife.

Did he do so under or by virtue of the operation of the deed of partition? The husband is not to be deprived of an interest in his wife's property unless the intention be clear that he is not to derive any benefit from it: *Rich v. Cockell*, 9 Ves. 369, 377; *Gilbert v. Lewis*, 1 DeG. J. & Sm. 38; *Turse's Trust*, L. R. 1 Eq. 561. But no particular form of words is necessary to raise a trust for the separate use: *Stanton v. Hall*, 2 Russ. & M. 175, 180; *Tyrell v. Hope*, 2 Atk. 558; *Darley v. Darley*, 3 Atk. 399; *Lee v. Prideaux*, 3 Bro. C.C. 382; *Dixon v. Olmius*, 2 Cox 414; *Cape v. Cape*, 2 Y. & C. 543.

The following words have been held to create a trust for the wife's separate use, "Sole and separate use": *Parker v. Brooke*, 9 Ves. 583. "Sole use, benefit and disposition": *Ex parte Ray*, 1 Madd. 199. "For her own use and at her own disposal": *Prichard v. Ames*, 1 Turn. & R. 222. "Own sole use": *Ex parte Killich*, 3 Mont. D. & D. 480.

The words in the deed of partition now before us are "to and for her own separate use and benefit for ever." These words, on the authority of the decided cases, are beyond dispute sufficient to raise the trust for the separate use of the defendant.

Then does the fact that the conveyance is to her direct, and not to a trustee for her benefit, make any difference? The interposition of a trustee seems at one time to have been considered necessary to protect the separate interest of a married woman; but it is now well established in equity that the wife's interest will be protected by the conversion, if necessary, of the husband into a trustee for her: *Bennet v. Davis*, 2 P. Wms. 316; *Douglas v. Congreve*, 1

Beav. 59,72; *Parker v. Brooke*, 9 Ves. 583. See further, *Rich v. Cockell*, 9 Ves. 369, 375; *Newlands v. Paynter*, 4 M. & C. 408; *Hall v. Waterhouse*, 13 W. R. 633. And this has been done even in cases where the property was conveyed to the husband for the separate use of the wife: *Ex parte Wells*, 2 Mont. D. & D. 504; *Newlands v. Paynter*, 4 M. & C. 408, 10 Sim. 377.

There being no estate in which the husband would have a legal interest till the estate became one in possession under the operation of the deed of partition, and the estate being conveyed by that deed to the defendant for her separate use and benefit, with the knowledge and consent of the husband, I am of opinion, that notwithstanding the omission to appoint a trustee, there is such a separate estate in the defendant as would enable her in equity to charge it for the payment of debts.

It is now in equity decided, after much conflict of authorities, that the married woman to whose separate use real estate is settled, may dispose of the equitable estate either by will or by an instrument *inter vivos* not acknowledged under the Fines and Recoveries Act: *Taylor v. Meads*, 34 L. J. Ch. 203; *Pride v. Bubb*, L. R. 7 Ch. 64. And even if trustees be interposed, she can bind her separate property without their assent, unless the latter be made necessary by the deed conveying the property: *Essex v. Atkins*, 14 Ves. 542; *Hodgson v. Hodgson*, 2 Keen 704.

Although from an early period Courts of Equity have so far departed from the settled rules of law with respect to a married woman, as to admit of property being settled for her separate use, and had established the principle that with respect to property so settled she should be considered as a *feme sole quoad* the capacity of enjoying and the capacity of disposing of that property, it is remarkable how long and steadily they refused to grant to her the other capacity of a *feme sole*, that of contracting debts. It might very reasonably be considered that consistency required that she should have that capacity to the same limited extent to which she was constituted a *feme sole*,



although to have extended her capacity of contracting debts beyond that limit would have clearly been a violation of all principle. After a time, however, being pressed by the injustice of allowing her, after having solemnly and deliberately entered into an engagement for the payment of money, to continue in the enjoyment of her separate property without paying her creditors, the Courts so far ventured to hold, that if she made a contract for the payment of money by a written instrument, with a degree of formality and solemnity, as by a bond under her hand and seal, in that case the property settled to her separate use should be made liable to the payment of it; and this principle, if principle it could be called, was subsequently extended to instruments of a less formal character: *Snell's Principles of Equity*, 3rd ed., 302: such as bills of exchange: *Stuart v. Kirkwall*, 3 Mad. 387; *Owen v. Horman*, 4 H. L. C. 997; *McHenry v. Davies*, L. R. 10 Eq. 88; promissory notes: *Bullpin v. Clarke*, 17 Ves. 365; *Field v. Sowle*, 4 Russ. 112; and ultimately any written agreement: *Master v. Fuller*, 1 Ves. 513; *Murray v. Barlee*, 3 M. & K. 209; *Picard v. Hine*, L. R. 5 Ch. 274.

But still the Courts refused to extend it to a verbal agreement or other common assumpsit, and even as to these more formal engagements, which they held to be payable out of the separate estate, they struggled against the notion of their being regarded as debts, and for that reason they invented reasons to justify the application of the separate estate to their payment without recognizing them as debts or letting in verbal contracts: *Snell's Equity*, 304.

A growing tendency has been manifested to adopt a more consistent course by holding:

1. That to the same extent to which a married woman is by Courts of Equity constituted a *feme sole* with respect to the capacity of disposing of her property, she ought also to be regarded as a *feme sole* with respect to the capacity of contracting debts or engagements in the nature of debts.

2. That all such debts or engagements should stand on

the same footing, in whatever form contracted: *Snell's Equity* 305, referring to *Vaughan v. Vanderstegan*, 2 Drew. 182.

The different authorities bearing on this branch of the law will be found carefully collected in *Merrick v. Sherwood*, 22 C. P. 467.

Mr. Justice Gwynne, in *Merrick v. Sherwood*, after reviewing the cases, concludes at p. 475: "The undoubted law, then, independently of any statute, is, that where goods are sold by a tradesman to a married woman upon her express promise to pay out of her separate estate, and upon the faith and credit of that estate the vendor becomes *her* creditor, and she alone, and not her husband, the debtor; the transaction creates *a debt* due by the married woman alone, although it was enforceable in equity only, and only against the separate estate."

In *Mathewman's Case*, L. R. 3 Eq. 781, Kindersley, V. C., said at p. 787: "It clearly is not necessary that the contract should be in writing, because it is now admitted that if a married woman enters into a verbal contract, expressly making her estate liable, such contract would bind it; nor is it necessary that there should be an express reference made to the fact of there being such separate estate, for a bond or promissory note given by a married woman, without any mention of her separate estate, has long been held sufficient to make her separate estate liable. If the circumstances are such as to lead to the conclusion that she was contracting, not for her husband, but for herself, in respect of her separate estate, that separate estate will be liable to satisfy the obligation."

*Mathewman's Case* is followed and approved in *Butler v. Cumpston*, L. R. 7 Eq. 16.

In *McHenry v. Davies*, L. R. 10 Eq. 88, the Master of the Rolls held that where a married woman, living abroad alone under circumstances which led to the belief that she was a *feme sole*, endorsed a bill of exchange and drew a cheque on her London bankers for the purpose of enabling her agent to raise money, and the bill and cheque were afterwards cashed by a banker in Paris, but dishonoured.

that the separate estate of the married woman was liable to make good the amount.

The learned Judge, adopting the expression of Lord Justice Turner in *Johnson v. Gallagher*, 3 DeG. F. & J. 521: said at p. 92, "The Court is bound to impute to her the intention to deal with her separate estate, unless the contrary is clearly proved."

The principle of these decisions has been followed with approval in the United States in the *Corn Exchange Insurance Co. v. Babcock*, 1 Am. 601; *Deering v. Boyle*, 12 Am. 480.

The decisions so far establish that if the work and materials in question were done and supplied at the request of or upon the credit of the defendant, her separate estate would be liable in equity, and a suit be maintainable against her at law.

But the question remains whether, as the work was done and materials were supplied to her agent for the benefit of her property, but without any knowledge at the time either of her or her property, her separate estate can be charged for the debt, and she sued at law in respect of it.

I know of no English or Canadian case directly in point. No case of the kind was cited on the argument. The nearest case on the facts that I have found is *Owen v. Carwley*, 36 N. Y. 600. It was an action for the recovery of services rendered to a married woman for the benefit of her separate estate. The defendant carried on a ship chandlery business. Her husband was her agent, for the purpose of carrying on the business. The husband employed the plaintiff to collect various demands arising out of the business. There was no communication whatever between the plaintiff and the married woman. There was a recovery in favour of the plaintiff, and the Court sustained the recovery.

In doing so, the Court said at p. 604: "Where services are rendered for a married woman by her procurement on the credit and for the benefit of her separate estate, there is an implied agreement and obligation springing from the nature of the consideration, which the Courts will enforce by charging the amount on her property as an equitable lien."

I gather from the report of this case that the plaintiffs at the time they performed the services in respect of which they sued, knew that the business was the business of the wife, and although employed by the husband, they charged her for the services.

In this respect it is distinguishable from the case now before us.

While I am desirous, if possible, to sustain the recovery against the defendant, I am unable, in the absence of authority, to hold that the contract is one "made by her respecting her real estate," within the meaning of section 1 of the Act or her "separate debt engagement or contract," within the meaning of section 9 of the Act.

In *Owen et al. v. Cawley*, as I understand the case, the husband never was liable to be sued on the contract. In this case the husband is primarily liable. In a case where it is in the option of the creditor to sue the husband or wife, I doubt if it can be said that the contract is her contract or the debt her "separate debt" within the meaning of the Act.

While I feel that the law ought to be so, I regret to say that I cannot bring my mind to the conclusion that the law is so.

I had hoped, on turning to the Mechanics' Lien Act of 1873, 36 Vic., ch. 27, to find that the plaintiff has some remedy under that Act, but in this I have been disappointed.

The Act gives a lien to "every mechanic, machinist, builder, miner, contractor, and other person doing work upon, or furnishing materials to be used in the construction, alteration, or repair of any building or erection *at the instance or request of the owner thereof, and upon credit given to him,*" &c.: sec. 1.

The words which I have italicized are omitted from the corresponding section of the Mechanics' Lien Act of 1874, 38 Vic., ch. 20, sec. 2.

But the later Act is, I apprehend, inapplicable to work done or materials supplied, as here, before the passing of it.



Besides it is provided by sec. 2 of the Act of 1873, that no lien under the Act shall exist unless and until a statement of claim, in the form or to the effect in the schedule to this Act, is filed in the registry office, "before or during the progress of the work, or within one month from the completion thereof." The statement is required to mention, among other things, "the name and residence of the claimant, and of the owner of the property to be charged, and of the person for whom *and* upon whose credit the work is done or materials furnished."

I am unable to hold that a person furnishing materials upon the credit of the husband, is entitled, under the Mechanics' Lien Act of 1873, to file a lien against the property of the wife; and even if I could so hold, the time for the filing of the lien has long since passed:

I fear the plaintiff on the facts proved in this case is without remedy, save as against the husband. If he be worth nothing, the remedy is valueless. But this is a matter which ought to have been ascertained by the plaintiff before he delivered the materials on his credit. Not having done so, the plaintiff must submit to the consequences of his own neglect.

The rule must be made absolute to enter a nonsuit.

MORRISON, J.—I concur in the conclusions arrived at by the learned Chief Justice.

WILSON, J.—The wife alone is sued for the debt claimed. The evidence shewed that the husband alone contracted with the plaintiff, and that the plaintiff dealt alone with him and gave him the goods in question upon his own credit, and without any knowledge that he was getting them for the wife, or for her private property. He dealt with the husband as with an ordinary customer, without any reference to his wife or to her separate estate. The goods so got by the husband were used in the construction of houses which the wife was building upon her own property.

If the plaintiff can make the wife liable as an undisclosed principal at the time he dealt with her agent as the principal, he having discovered the true relation of the parties since his sale of the goods,—in like manner as he might hold the undisclosed principal liable in any ordinary case upon discovering him—then it has to be considered whether it can be said that she contracted in respect of her separate estate.

As a fact she did not contract with the plaintiff. He knew nothing of her as a contracting party, he gave her no credit, and he could not have contracted, and did not contract, with her in respect of her separate estate.

As an undisclosed principal the wife would not alone be liable. If liable as an ordinary undisclosed principal, she is so equally with her agent at the election of the plaintiff. And there is a difficulty in such a case in holding that the wife contracted a separate debt, and in respect of her separate estate; and that the plaintiff dealt with the wife and gave credit to her, so as to entitle him to reach her separate estate.

In *Johnson v. Gallagher*, 3 De G. F. & J. 494, 7 Jur. N.S. 273, at page 278, Turner, L. J., said:—"The cases of *Jones v. Harris*, 9 Ves., 486, and *Aguilar v. Aguilar*, 5 Mad., 414, shew that the engagement which, if the married woman was a *feme sole*, the law would create for repayment of the consideration of a void annuity, would not affect the separate estate. It seems to follow, that to affect the separate estate, there must be something more than the mere obligation which the law would create in the case of a single woman. What that something more may be must, I think, depend in each case upon the circumstances. What might affect the separate estate in the case of a woman living separate from her husband, might not, as I apprehend, affect it in the case of a woman living with her husband; what might bind the separate estate, if the credit be given to the married woman would not, as I conceive, bind it if the credit be not so given. The very term 'general engagements,' when applied to a married

woman, seems to import something more than mere contract, for neither in law nor in equity can a married woman be bound by contract: *Aylett v. Ashton*, 1 My. & Cr. 105. According to the best opinion which I can form on a question of so much difficulty, I think that in order to bind the separate estate by a general engagement, it should appear that the engagement was made with reference to, and upon the faith or credit of, that estate, and that whether it was so made or not is a question to be judged of by this Court upon all the circumstances of the case."

If it appear the married woman did not intend to bind her separate estate it will not be liable. As where a married woman having separate estate sold an annuity for a consideration which failed from the want of a proper memorial, it was held her separate estate was not liable for the money paid to her, as it was plain she never intended to make her separate estate liable; that the claim did not arise by express agreement, and an implied liability would not be created against her.

So, also, where a woman having separate estate had received rent which she claimed on property which was not in fact hers, it was held her separate estate could not be made liable for it. I refer to the cases of *Aguilar v. Aguilar*, 5 Mad. 414; *Jones v. Harris*, 9 Ves. 486; and *Wright v. Chard*, 1 De G. F. & J. 567, 5 Jur. N.S. 1334.

The last case is very applicable here, for the trustee of the married woman who collected the rent and paid it to her was held liable to account for the rents he had got; while the married woman who got the money was discharged from all liability.

It cannot be said here, since our legislation on the subject, that the married woman cannot *contract*, as is said in *Aylett v. Ashton*, 1 M. & Cr. 105, where a recovery against her is held to be in the nature of a proceeding *in rem*, and not *in personam*; the relief being given against her property by reason of the claim being chargeable upon it, and not against herself; the suit in equity against her by English law failing entirely if there is no separate estate.

For by the 35 Vic., ch. 16, sec. 9, whatever a married woman may have been able to do under the Consol. Stat. U. C., ch. 73, she can now "be sued or proceeded against separately from her husband in respect of any of her separate debts, engagements, contracts, or torts, as if she were unmarried." That provision is not contained in either of the Imperial Acts 33 & 34 Vict., ch. 93; or 37 & 38 Vict. ch. 50, so that our legislation is very much in advance of what it is in England.

If a married woman can contract in this province, and be made liable upon it whether she has separate estate or not, and in like manner as any other person, the defendant must be liable in this action.

Under the first section of the Act of 1872, the married woman is presumed to have separate use when she is made "liable on any contract made by her respecting her real estate as if she were a *feme sole*." But after contracting to sell or lease it, suppose she sell or lease it to another without notice, and she lose or dissipate the proceeds of it, is she not to be liable on her contract for the money that may have been paid to her for it?

Under the second section the married woman may hold, enjoy, and dispose of her wages and personal earnings, and all investments of such wages, earnings, moneys, or property, "as fully as if she were a *feme sole*;" so that if she were to contract in respect of them she would be liable, I presume, although she had no separate estate.

So the ninth section seems to make the married woman answerable, whether she has a separate estate or not. She is to be liable not only for her contracts, but for her torts "as if she were unmarried."

If she assault another, or wrongfully deprive him of his property, or libel or slander him, why is her liability to depend upon her having separate estate or not? Why in such cases should she not, under the very general language of the Act, be made liable "as if she were unmarried"—that is, as a *feme sole*, or any other person *sui juris*?

I am of opinion the liability of the married woman to



suit for torts,—and, as it appears to follow as a consequence, on her contracts also,—is of a personal nature, not depending upon her possession of a separate estate; that the proceeding against her is not to be considered as under the former law in the nature of a proceeding *in rem*, but as an ordinary suit against a person who is competent to contract and be contracted with.

If she has borrowed money or bought goods, and refuses to pay her creditor, why should he not have a judgment against her, and make it available as in any other case so soon as his debtor is in the possession of property. And why, also, if she is going to abscond should she not be arrested?

If the defendant had personally contracted in this case, or had contracted a *separate debt* in the language of the statute, I should have held her liable, so far as I am concerned, whether she had a personal estate or not, or had contracted in respect of it or not. But the facts shew here that the wife did not contract a separate debt.

In *Laporte v. Costick*, 31 L. T. N. S. 434, it was held that where a husband takes such a part in his wife's business as to make himself personally liable, the business is not carried on separately from the husband within the meaning of the Married Woman's Act, 1870; although a separate business may be carried on by a wife while residing with her husband.

Now the plaintiff's right against the defendant is, that although the credit was given to the husband, yet the husband being only an agent for a principal then unknown to the plaintiff, he, the plaintiff, having the right to sue either the agent or the principal, has elected to sue the principal. But the very statement of such a case puts the plaintiff out of court; for the fact that credit was given to the plaintiff shows it was not the separate debt of the wife.

It was also argued that the defendant was not within the Act of 1872, because she was married before that Act was passed; and it was said to have been decided that the first section of that Act applied only to marriages which have taken place since the passing of the Act.

It is not necessary to consider these cases at present ; because the defendant is not sued under the first section of the Act, but under the ninth section.

I shall be obliged, perhaps, to express my own opinion in some case yet as to whether the first section of the Act is prospective only, or whether it has not also a retrospective operation ; and it will be time enough to do it when the occasion comes.

It has, however, been held that the ninth section, under which this action is brought, is retrospective.

I think the reason given is, that it applies to remedies only, and does not confer any new right other than in the way of a remedy. I think the section is retrospective not for that cause, but from the force and operation of its language.

Some of the decisions have been that a married woman had acquired no rights of contract or of suit under the Consol. Stat. U. C., ch. 73. If that really were the law before the Act of 1872, then section nine of that Act must give something more than a mere remedy. For a married woman's contracts were void, not only voidable, at the common law ; and the late Act declares they shall be valid, which is something more than a remedy afforded to the parties.

As already intimated, the defendant, in my opinion, is entitled to succeed, because she did not in fact contract a separate debt. Her husband alone contracted with the plaintiff, and the credit was to the husband. In such a case the statutes do not apply. I regret the plaintiff should not be entitled to recover against the defendant, although a married woman, upon the same ground and in the like manner as he could have recovered against one fully *sui juris*, upon discovering that the husband was only an agent representing a principal unknown to him at the time of the contract, and whom he had elected to sue upon discovering who the principal was.

In my opinion the rule should be made absolute.

*Rule absolute.*

GEORGE MCHARDY V. THE CORPORATION OF THE TOWNSHIP OF ELLICE AND THE CORPORATION OF THE TOWNSHIP OF DOWNIE.

*Road between townships—Bridge—Duty to repair—Municipal Act of 1873, secs. 413, 416.*

A stream called Black Creek crosses the road running between the townships of Ellice and Downie, and is crossed by a bridge on that road. It is a stream of from 30 to 40 feet in width, with clearly defined banks. The approaches to this bridge being out of repair, the plaintiff driving there was upset and injured.

Sec. 413 of the Municipal Act enacts that it shall be the duty of county councils to maintain bridges over rivers forming or crossing boundary lines between two municipalities within the county; and sec. 416 provides that in case a road lies wholly or partly between adjoining townships, &c., the councils of the municipalities between which it lies shall have joint jurisdiction over the same, and the said road shall include a bridge forming part of the road.

At the trial the plaintiff was nonsuited, the learned Judge ruling that this was a case within sec. 413, and that the county, therefore, and not the two township corporations, (the defendants) was liable.

*Held*, that whether the Black Creek was a river, within that section, was a question of fact, not of law, and that the nonsuit therefore was wrong;—and *Seemle*, per HARRISON, C. J., that it was not a river.

Secs. 413 and 416 may be read together by taking sec. 416 to declare that the road shall include a bridge forming part of the road for the purposes of that section, except as provided by sec. 413, where the bridge crosses a river.

ACTION for negligence.

The first count of the declaration alleged that the defendants wrongfully allowed their bridge at Sebringville, upon the road, being a highway belonging to them between the townships of Ellice and Downie, to get out of repair and so remain, whereby, &c.

The second count was for wrongfully allowing the approach to the bridge at Sebringville to get out of repair and so remain, whereby, &c.

The third count alleged it to be the duty of defendants to keep in repair the bridge at Sebringville and the approaches thereto on the road, and alleged as a breach that defendants negligently and carelessly permitted and allowed the said bridge and the approaches thereto to get out of repair and so remain, whereby, &c.

The defendants, the Corporation of the township of Ellice, pleaded :

1. Not guilty.
2. As to so much of the declaration as complains of an injury to horses, that the horses were not the property of the plaintiff.
3. As to the first count, denial of the bridge being the bridge of the defendants.
4. As to the second count, a similar plea in regard to the approach to the bridge.
5. As to the third count, traverse of the duty alleged, to keep the bridge or approaches in repair.

The defendants, the Corporation of the township of Downie, pleaded similar pleas.

The plaintiff took issue on the pleas, and required the issues to be tried by a jury.

The case was tried at the last Spring Assizes for the County of Perth, before Gwynne J.

It was proved that the accident happened on the 9th of January, 1875, at a bridge in Sebringville, on the public road between the townships of Ellice and Downie. The plaintiff had a team of horses and a sleigh loaded with lumber. He was going easterly along the road towards Stratford. He was on the top of the load driving. There was a hole in the approach to the bridge not far from the bridge; it was about three feet deep and four feet wide and six feet long. The day was stormy; the road was icy. When the plaintiff was driving up the approach his horses shied. The sleigh slewed; one of the horses got into the hole; the plaintiff was pitched off the load; all then pitched over. The sleigh fell on top of the load. Plaintiff was under the sleigh, and received severe injuries; one of the horses was also injured. If the hole had not been in the road, the accident would not have happened. There was no protection between the hole and the planking at the bridge. The horse belonged to the plaintiff's brother. The place was described by several witnesses as being very dangerous. It was so a month or more before



the day of the accident. Two years previously there was a hole in the same place; some cedar posts were then put in the side and the hole filled up. The abutment of the bridge, however, was rotten, and so the earth disappeared and again the hole appeared. It re-appeared in the summer of 1874; this was owing to the water washing away the earth. The hole was allowed so to remain till the sleighing came on. There was planking put on it in the summer of 1874, but the hole went in under where the planking was put. The hole became larger in the fall of the year, and had the planking been raised up as high as it was two years previously it might have been safe; but at the time of the accident the place was unsafe.

The approach to the bridge which forms part of the road is an embankment about seven feet high. The width of the stream is probably thirty or forty feet. The banks of the stream are clearly defined above and below the bridge. The stream is called the Black Creek. It runs all the time—always a little. In times of freshet the water backs up along the embankment at the approach to the bridge. There is a dam in the creek above the bridge.

There was no evidence to shew that the road or bridge in question had been assumed by by-law of the county council.

It was, however, admitted by counsel for the plaintiff that the bridge is across a stream or water-course which crosses the boundary line between the townships of Ellice and Downie, and that the width of the bridge between the abutments is fifty feet.

This being admitted, the learned Judge, on the objection of the defendants' counsel, ruled that the case was within the 413th section of the Municipal Institutions Act, as amended by 37 Vic. ch. 16 O., and that, therefore, the county, and not the township municipalities, was liable.

Counsel for the plaintiff, in deference to the ruling, but protesting against it, accepted a nonsuit.

In Easter term, May 20, 1875, *Charles S. Jones* obtained

a rule calling on the defendants to shew cause why the nonsuit should not be set aside, and a new trial had between the parties, on the following, among other grounds:—

1. For erroneously nonsuiting the plaintiff, notwithstanding there was sufficient evidence to entitle the plaintiff to a verdict against the defendants, as having joint jurisdiction over the bridge and the abutments thereof, and being bound to keep the same in repair.

2. That the question whether the bridge and approaches thereto were under the joint jurisdiction of the defendants, and they bound to repair it, ought to have been submitted to the jury upon the trial.

3. That the stream over which the bridge was built is not a river within the meaning of the Municipal Act, and the bridge and approaches thereto lying between the townships of Ellice and Downie were under the joint jurisdiction of the defendants, and they bound to repair the same.

4. That the question whether the stream over which the bridge was built was a river or not ought to have been submitted to the jury.

In Michaelmas term, November 30, 1875, *Robert Smith* shewed cause. The plaintiff was guilty of contributory negligence, and on this ground the nonsuit may be sustained. The nonsuit is right also on the ground on which it was granted: 36 Vic. ch. 48, secs. 410, 413, 416, 431, 436, O., as amended by 37 Vic. ch. 16 O.: *O'Connor v. Township of Otonabee et al.*, 35 U. C. R. 82, 83; *Corporation of the County of Wellington v. Wilson*, 16 C. P. 124, 130; *Re McBride and The Corporation of York*, 31 U. C. R. 355; *Regina v Corporation of the Village of Yorkville*, 22 C. P. 431; *Kinnear and the Corporation of the County of Haldimand*, 30 U. C. R. 398. At common law it is the duty of counties to maintain bridges: *Coke's Inst.*, 701, 702; and at all events there are such inconsistencies in the Municipal Act that the rule of the common law should be allowed to prevail: *Rex v. Inhabitants of the West Riding of Yorkshire*, 2 East 342; *Rex v. Inhabitants of Oxfordshire*, 4 B.

& C. 194; *Regina v. Davis*, 35 U. C. R. 107. Black Creek is a river or stream within the meaning of section 410 of the Act: *Rex v. Inhabitants of Whitney*, 3 A. & E. 69; *Regina v. Inhabitants of Derbyshire*, 2 Q. B. 745.

*Charles S. Jones contra.* This case is excluded from the operation of section 410 by the decision of *O'Connor v. The Township of Otonabee et al*, 35 U. C. R. 73. Sections 410 and 413 of the Act may be harmonized as decided in that case. At all events the question whether the creek was a river or not under section 413 of the Act should have been submitted to the jury: *Regina v. Meyers*, 3 C. P. 305, 319; *Clarke's Criminal Law*, 413. The case is governed by section 416 of the Act, which, among other things, declares that the road "shall include a bridge forming part of the road." There was no such contributory negligence on the part of the plaintiff as to justify the Judge in withdrawing the case from the jury.

February 4, 1876, HARRISON, C.J., delivered the judgment of the Court.

In this case there was, we think, evidence proper for the consideration of the jury on the question whether the approaches to the bridge were out of repair.

We do not think the learned Judge would, as matter of law, have been justified in withdrawing the case from the consideration of the jury on the question of contributory negligence. See *Clayards v. Dethick*, 12 Q. B. 439, and cases cited in *Blackmore v. The Toronto Street R. W. Co.*, not yet reported.

The remaining question is whether, assuming the approaches to the bridge to be out of repair, and assuming no such contributory negligence on the part of the plaintiff as in law to disentitle him to recover, the action is properly brought against the township corporations between which the road was lying and on which road the bridge was situate.

The learned Judge ruled that the action should have been brought against the county and not the townships, and so nonsuited the plaintiff.

If the learned Judge was wrong in this ruling, the nonsuit must be set aside.

By the common law, counties were chargeable with the repair of public bridges unless it were shewn, in the language of 22 Hen. VIII. ch. 5, "what person's lands, tenements and bodies politic owen (ought) to make and repair such bridges." See *Rex v. The Inhabitants of the West Riding of Yorkshire*, 2 East 342; *Rex v. The Inhabitants of Oxfordshire*, 4 B. & C. 194; *Regina v. The Inhabitants of Derbyshire*, 2 Q. B. 745; *Regina v. The Inhabitants of New Sarum*, 7 Q. B. 941.

The statute "for bridges and highways" was passed in 1530 (22 Hen. VIII. ch. 5.) It recited that "in many parts of the realm "it cannot be known and proved what hundred, riding, wapentake, city, borough, town, or parish, nor what person certain, or body politic, ought of right to make such bridges decayed, by reason whereof such decayed bridges for lack of knowledge of such as owen (ought) to make them, for the most part lie long without any amendment, to the great annoyance of the King's subjects."

And, for remedy, enacts: "That in every such case the said bridges, if they be without city, or town corporate, shall be made by the inhabitants of the shire or riding within which the said bridge decayed shall happen to be; and if it be within any city or town corporate, then by the inhabitants of every such city or town corporate, wherein such bridge shall happen to be; and if part of any such bridges so decayed happen to be in one shire, riding, or town corporate, and the other part thereof in another shire, riding, city, or town corporate, or if part be within the limits of any city, or town corporate, and part without or part within one riding, and part within another; that then in every such case the inhabitants of the shires, ridings, cities, or towns corporate shall be charged, and chargeable to amend, make, and repair such part and portion of such bridges so decayed as shall lie and be within the limits of the shire, riding, city, or town corporate



wherein they be inhabited at the time of the same decays."

And further enacts that in every such case where it cannot be known and proved "what persons, lands, or tenements, and bodies politic, owen to make and repair such bridges that for speedy reformation and amending of such bridges, the Justices of the Peace" may levy a tax for repair and amendment of the same.

In the United States bridges are usually, for purposes of repair, part of the street or highway. In that country the power of municipal corporations to build them, and their authority over them, are generally statutory, and their duties in respect to them are either prescribed by statute or spring from powers conferred by statute. In that country there is no common law responsibility on municipal corporations in respect to the repair of bridges within their limits; but, where bridges are part of the streets and built by the municipal authorities under powers given to them by the Legislature, the municipalities are liable for defects therein on the same principles and to the same extent as for defective streets. See *Dillon's Mun. Corporations*, 2nd ed., sec. 579, and cases cited in the notes.

In this Province, however, where the ownership of the bridge on a stream between two counties was proved to be in the two counties, they were held to be rightly sued for an injury arising from non-repair of the bridge, although counties were not and are not mentioned in the section of the Municipal Act which gives a right of action for the recovery of damages for damage arising from non-repair of a bridge or road: *Harrold v. The Corporations of the County of Simcoe et al.*, 16 C. P. 43, affirmed on appeal 18 C.P.9. See further *Corporation of the County of Wellington v. Wilson et al.*, 14 C. P. 299, S. C., 16 C. P. 124; *Hacking v. The Corporation of the County of Perth*, 35 U. C. R. 460, reversed in appeal, *Ibid*, 467.

So far, however, as the provisions of the Municipal Act are inconsistent with the common law, they must be held to supersede the common law.

It is enacted by 37 Vic., ch. 16, sec. 17, O., being sec.

410 of the Municipal Institutions Act, that "The County Council shall have exclusive jurisdiction over all roads and bridges lying within any town or village of the county, and which the Council by by-law assumes with the assent of such town or village municipality as a county road or bridge, until the by-law has been repealed by the council, and over all bridges across streams separating two townships in the county, and over all bridges crossing streams or rivers over one hundred feet in width, within the limits of any incorporated village in the county, and connecting any highway leading through the county, and over every road or bridge dividing different townships, although such road or bridge may so deviate as in some places to lie wholly, or in part, within one township."

It is enacted by 37 Vic., c. 16, sec. 18, being sec. 412 of the Municipal Institutions Act, that "When a County Council assumes by by-law any road or bridge within a township as a county road or bridge, the council shall, with as little delay as reasonably may be, and at the expense of the county, cause the road to be planked, gravelled, or macadamized, or the bridge to be built in a good and substantial manner; and further, the County Council shall cause to be built and maintained in like manner, all bridges on any river or stream over one hundred feet in width, within the limits of any incorporated village in the county, necessary to connect any public highway leading through the county."

It is enacted by 37 Vic., ch. 16, sec. 19, being sec. 413 of the Municipal Institutions Act, that "It shall be the duty of County Councils to erect and maintain bridges over rivers, forming or crossing boundary lines between two municipalities (other than in the case of a city or separated town) within the county, and in case of a bridge over a river forming or crossing boundary lines between two counties, or a county and a city, such bridge shall be erected and maintained by the councils of the counties or county and city respectively."

It is enacted by sec. 416 of the Municipal Institutions

Act that "In case a road lies wholly or partly between a county, town, city, *township* or incorporated village, and an adjoining county or counties, town, city, *township* or incorporated village, the councils of the municipalities between which the road lies, shall have *joint jurisdiction* over the same, although the road may so deviate as in some places to be wholly or in part within one or either of them, and the said road shall include a bridge forming part of the road."

It is enacted by sec. 431 of the same Act that "Whenever township councils fail to maintain *township boundary lines* not assumed by the County Council, in the same way as *other* township roads by mutual agreement as to the share to be borne by each, it shall be competent for one or more of such councils to apply to the County Council to enforce joint action on all the townships interested."

There are apparent inconsistencies between secs. 410, 416, and 431 of the Municipal Act, as pointed out by Mr. Justice Wilson in *O'Connor v. The Township of Otonabee et al.*, 35 U. C. R. 73, which the learned Judge attempted to reconcile, and so far as that case is applicable it must in this Court govern this case.

*O'Connor v. The Township of Otonabee et al.* was a similar action to the present. The road was one between townships. The defect was the want of repair of a bridge over a creek. The bridge which had been over the creek was burned, and the townships were held to be liable for the defect.

In giving judgment, Mr. Justice Wilson said, at p. 84: "The only way to bring these sections (secs. 410, 416, and 431,) into accord is to read the 410th section as modified by the 416th and 431st sections, and as meaning that every road dividing different townships shall, *when assumed by the County Council*, be within the exclusive jurisdiction of the county." He also said, at p. 85, that "The case of *McBride v. The Corporation of York*, 31 U. C. R. 365, so far as it expresses that roads between townships

are, *without having been assumed by the county, within the sole control of the county, must be modified.*"

*O'Connor v. Otonabee* would seem, in the absence of a by-law of the county adopting a road between townships as a county road, to prevent the application of sec. 410 to the present case.

The 416th section, if not affected by sec. 413 of the Municipal Act, would appear to govern this case. It confers the jurisdiction over a road lying wholly or partly between townships on the townships, and declares that "the said road *shall include a bridge forming part of the road.*"

The bridge in question formed part of the road between the townships of Ellice and Downie, and the jurisdiction over it would, therefore, under sec. 416, be vested in the defendants. But the learned Judge at the trial ruled that sec. 413, which declares that it shall be the duty of the County Council to erect and maintain *bridges over rivers* forming or *crossing* boundary lines between two municipalities (other than in the case of a city or incorporated town) within the county, is the only section which applies.

Such a construction should be given to sections 413 and 416 as will, if possible, make them both operative.

They may be read together by taking sec. 416 to declare that the road shall include a bridge forming part of the road, for the purposes of the section, except as provided in sec. 413 where the bridge crosses a *river*.

Now, what is a river? In legal language, a river has been defined by Woolrych "to be a running stream pent in on either side with walls and banks." (See *Woolrych* on Law of Waters, 31; *Callis* on Sewers, 4th ed., 77.)

Probably the best definition is the interpretation which Lord Tenterden, in *Rex v. The Inhabitants of Oxfordshire*, 1 B. & Ad. 301, judicially gave to the words "*flumen*," or "*cursus aquæ*," the words used in old indictments to denote that over which a bridge is built. "Water flowing



in a channel between banks more or less defined." See *Houck* on Rivers, s. 2; *Phear* on Rights of Water, 31.

But the enquiry is, not as to the general meaning of the word "river" when uncontrolled by context or other surrounding circumstances, but what is the particular meaning of the word river as used in section 413 of the Municipal Institutions Act.

The Legislature in some of the sections of the Municipal Institutions Act use the word "stream," in others "watercourse," in others "river," and in others "creek." See secs. 410, 413, 416, and 447. The words "stream" and "watercourse" may be looked upon as synonyms, but certainly not the words "river" and "creek." Every stream may be said to be a watercourse and every watercourse may be said to be a stream of water. But every river cannot with propriety be said to be a creek or every creek a river. A river in popular language is an inland current of water formed by the confluence of brooks, small streams, &c. A brook is the name given to rivers of the smallest description, and if the waters be increased by those of another brook, the name of brook is changed into that of rivulet. When several rivulets unite and so produce a considerable volume of running water, this watercourse takes the name of river. See *Imperial Dictionary* and *Webster's Dictionary*, title "River."

The word "creek," in some of the American States and in Canada, means a small river. This sense is not justified by etymology, but as streams often enter into creeks and small bays or form them, the name has been extended to small streams in general. See *Imperial Dictionary* and *Webster's Dictionary*, title "Creek."

It appears to me that the Legislature used the word "river," in sec. 413, as meaning a stream of water larger than what would be commonly or could be properly called a creek in Canada.

Large streams require large bridges and large bridges cost large sums of money. While there would be nothing unfair in throwing upon the local or smaller municipalities

the duty of erecting and maintaining bridges over small streams, it would be very unjust to cast upon them the burden of erecting and maintaining large structural works on leading county thoroughfares used by the people of the county at large.

The difficulty arises from the fact that the Legislature has omitted to give in the Act any definition whatever of the word "river," and in one of the sections uses the words "river" and "stream" as meaning one and the same thing.

Rivers are said to be public or private, navigable or non-navigable. The question whether a river is a public navigable river appears to be a question of fact rather than a question of law. See *Regina v. Meyers*, 3 C. P. 305; *Gage v. Bates*, 7 C. P. 116.

So the enquiry, whether a particular structure is a bridge and not merely a culvert appears to be a question rather of fact than of law. See *Rex v. The Inhabitants of Whitney*, 3 A. & E. 69.

The learned Judge in the case now before us seems, on the objection of defendants' counsel, to have withdrawn the case from the jury and to have ruled as a matter of law that the "Black Creek" is a river within the meaning of sec. 413 of the Municipal Institutions Act.

In this respect we all think the learned Judge erred.

If the question were one of law and not of fact we should not feel inclined to hold that the stream called and known as the "Black Creek" is a river within the meaning of the 413th section. Looking at its size, use, and popular acceptance, the inclination of my opinion is decidedly in a different direction.

The rule must be made absolute to set aside the nonsuit.

*Rule absolute.*

## BROWN V. COCKBURN ET AL.

*Free grant lands—Sale of timber thereon—Right of purchaser to deduct Crown dues—Warranty of title—36 Vic. ch. 8, O.—Evidence.*

The plaintiff agreed to sell to the defendants certain timber which he was about to cut on a lot in the Free Grant district, of which lot he was in occupation on or before the 30th of September, 1871. He cut it and delivered the logs at the place agreed upon, but the Government made a claim of \$111 upon them for timber dues, for which they would be liable in case the plaintiff had not, before cutting the trees, obtained his patent. There was no positive proof of this, but defendant swore that he told the plaintiff he had better not be in a hurry about cutting it, as he would soon have his patent, when there would be no dues, but that in the meantime there would be, to which the plaintiff replied that the local agent had informed him there would be no dues.

*Held*, that this, being unanswered, amounted to an admission on the plaintiff's part that the patent had not issued when the timber was cut, and was sufficient affirmative evidence of the fact, which was one peculiarly within the plaintiff's knowledge.

The defendants, without objection, put in a notice published by the Crown Lands Department, that pursuant to an Order in Council of the 4th of October, 1871, the Government would recognize the rights of all locatees of free grant lands before the 30th of September, 1871, to sell the pine thereon subject to certain dues. *Held*, that this was some evidence of the Order in Council, especially when taken in connection with the testimony that the Crown claimed only a lien for the dues.

*Held*, also, that although there was no express warranty of title, this being an executory contract for purchase and sale of a subject unascertained and afterwards to be conveyed, the purchaser was entitled to a good title; and that in an action for not accepting he might deduct the amount of dues for which the Crown held a lien.

*Semble*, however, that in all cases of the sale of chattels, the vendor by selling them as his own impliedly warrants the title, unless the facts shew that he intended only to transfer his interest.

DECLARATION. First count: On an agreement that the plaintiff should sell to the defendants and the defendants should buy from the plaintiff any and all timber of the plaintiff that the plaintiff might cut and prepare at the prices following, that is to say: Log timber at the price of \$3.50 per thousand feet, and square timber at the price of \$19 per thousand feet, to be delivered by the plaintiff in St. Mary's lake, in the district of Parry Sound, and to be accepted by the defendants as soon as delivered, and to be paid for by the defendants to the plaintiff on such delivery in ready money; with an averment that the plaintiff cut

and prepared and hauled and delivered in St. Mary's lake 193 feet of log timber, and 1000 feet of square timber, and that all conditions, &c., were fulfilled to entitle the plaintiff to have the goods accepted, yet defendants did not accept &c.

The remaining counts of the declaration were for goods bargained and sold, goods sold and delivered, &c.

Pleas to the first count:

1. Except as to \$150, that defendants did not promise.
2. Except as to \$150, a traverse of the deliveries.
3. Payment into Court of \$150.

4. On equitable grounds, as to the residue of the moneys claimed, that the timber was cut under a license from the Commissioner of Crown Lands of the Province of Ontario, pursuant to the statute and order in council in that behalf, and is liable for the payment of the Crown dues thereon, so long as and wheresoever the said timber or any part thereof may be found, and that all officers or agents entrusted with the collection of such dues may follow all timber, and seize and detain the same wherever it is found until the dues aforesaid are paid or secured, and that if any timber so seized and detained for nonpayment of the Crown dues remains more than twelve months in the custody of the agent or person appointed to guard the same, without the said dues being paid, that the timber may be sold for the payment of such dues: that the said dues have not been paid by the plaintiff: that a return of the said timber has been duly made to the said Commissioner of Crown Lands by the said defendants, and that the said defendants are charged with and are liable to pay and intend to pay the said Crown dues, to wit, the sum of \$117.45, and that the said timber is liable for the payment of the said dues, and may be followed until payment thereof, and in default of such payment may be seized and sold as aforesaid. And the defendants claim equitably to set off the amount of the said Crown dues, to wit, \$117.45, against the residue of the money claimed by the plaintiff.

To the common counts: never indebted, and payment.



The plaintiff accepted the \$150 paid into Court in satisfaction of the cause of action in respect to which it was paid in, and took issue on the remaining pleas.

The plaintiff required the issues to be tried by a jury.

The issues were tried at the Spring Assizes for 1875, for the county of York, before Strong, J., and a jury.

The plaintiff, in 1872, intending to cut timber on lot 22 in the 7th concession of the township of Stephenson, in the Free Grant district, made an agreement with one Macaulay for the sale of the timber to him within a limited time. In 1873, the defendants acquired whatever interest Macaulay had under this agreement. An agreement was then made between the plaintiff and the defendants for the sale of the timber to the defendants, and for an extension of the time for the removal of the timber. The plaintiff cut the timber in 1873-1874, and delivered it at the place agreed. He cut some of the timber from a part of the lot which he was clearing for cultivation. He cut also on other parts of the lot. There was nothing to shew what proportion was cut on the one part and what on the other parts of the lot. Defendants from time to time paid moneys on account of the timber cut and delivered. There was nothing very definite as to the price per thousand feet, and there was a dispute as to the quantity delivered.

The jury, on evidence which fully warranted their verdict, found that the contract price was \$3.50, and the quantity delivered 192,985 feet.

There was nothing said at the time the bargain was made about timber dues.

On the 9th of October, 1871, a notice was published by the Assistant Commissioner of Crown Lands, that pursuant to an order in council of 4th of October, 1871, the Government would recognize the rights of all purchasers or locatees of free grant lands in the township of Stephenson and other townships, who should have purchased or located in the townships named on or before the 30th September, 1871, and who should on that day have been in actual occupation of and resident on the lots located, to sell or dispose of all

pine trees standing or being on the lots located or purchased by them, subject to the following special rate of timber dues :

White and Red Pine timber, per cubic foot.  $2\frac{1}{2}$  cents.

White and Red Pine saw logs, per standard  
of 200 feet board measure (Scribner's  
Rule)..... 30 cents.

which the Department would collect on all timber and saw logs found to have been cut on any sold or located lot.

This notice was put in by defendants at the trial apparently without any objection.

There was evidence from which it might be inferred that the plaintiff, on or before the 30th of September, 1871, was in actual occupation of and resident on the lot in question, but the fact was not directly proved.

The defendant *Alexander P. Cockburn* was examined as a witness at the trial, and swore that the Government had made a claim of \$111 on the logs in question, and that he could not deal with the lumber made from the logs without paying the \$111. He also swore that he told the plaintiff he had better not be in a hurry about cutting the timber, as he would soon have his patent, when there would be no dues, but that in the meantime there were dues, to which he replied that he was informed by the local agent that there would be no dues. He further swore that the plaintiff had not his patent when the timber was cut.

The local agent was not called as a witness, but a witness called *Albert Sidney Smith* swore that dues are not paid on lumber unless the person cutting ships—in other words, that when the lumber is sold in the free grant district to settlers there are no dues.

A clerk from the Woods and Forest branch of the Crown Lands Department was called as a witness for the defence, and swore that there had been a return made of the timber in question, and that the order in council requires 15 cents to be paid for each log of 200 standard feet.

The return was not produced in evidence, nor was the order in council or any copy of it.

The learned Judge ruled that the timber dues should be paid out of the purchase money, *i.e.*, that they were to be deducted from the \$3.50 per thousand feet.

On the finding of the jury the verdict was entered for the plaintiff for \$137.80, with leave to the plaintiff to move to increase the verdict by adding \$111, the amount of the timber dues, if the learned Judge was wrong in his ruling.

In Easter Term, May 19, 1875, *G. B. Gordon* obtained a rule *nisi* calling on the defendants to shew cause why the verdict should not be increased by \$111, on the following grounds:

1. That the said item, being a sum for which the timber in the pleadings mentioned is alleged to be liable to the Government of the Province of Ontario, was never paid by the defendants, nor was the amount ever agreed upon between the parties, nor did the parties ever agree that it should be deducted from the purchase money.

2. That the evidence does not shew that the Government has a lien on the timber to the extent of the said sum or any other sum, inasmuch as it does not shew that the lot of land from off which the said timber was taken and sold was unpatented at the time the said timber was cut or sold.

3. That it is not shewn, even if the lot of land was unpatented at the time the timber was cut and sold, that the Government has or had a lien on the timber to the extent of the said sum, or any other sum.

4. That the evidence shews that timber dues accrue to the Government only on timber shipped and exported from the District of Muskoka, and not used in home consumption, and it is not shewn that the timber was exported or intended to be exported.

5. That the evidence shews that the timber was cut off a piece of land on the plaintiff's lot in the course of clearing for cultivation, and that under and by virtue of the statute in that behalf no Government dues have accrued or will accrue in respect thereof.

6. At the time the timber was sold to the defendants

there was no agreement in writing or otherwise, or understanding, express or implied, by which the defendants were to deduct out of the purchase money of the timber any Government or other dues accruing to the Crown in respect of the timber, and in such a case the maxim *caveat emptor* applies.

In Michaelmas Term, November 30, 1875, *J. Bethune* shewed cause. The evidence shews the timber to have been cut in the free grant district and before patent issued. There is nothing to shew an exemption of timber sold for home consumption, and even if there was there is nothing to shew that this timber came under the exemption. The consequence is, that the timber is subject to Crown dues, and these form as it were an incumbrance on it, and in equity at all events the purchaser would be entitled to deduct the amount of the incumbrance from the amount of the purchase money. He referred to 31 Vic. ch. 8, O.; Consol. Stat. C., ch. 23; *Hughson v. Cook*, 20 Grant 238.

*G. B. Gordon*, contra. There is no evidence that the land was not patented when the logs were cut. There is no evidence of any dues to the Crown. The copy of the order in council shewing the dues, if any, should have been put in evidence: *Taylor* on Ev. secs. 1371, 1437. An exception was shewn as to logs for home consumption, and it was not shewn that the logs in question were exported or intended to be exported. There was no warranty of title: *Morley v. Attenborough*, 3 Ex. 500; *Hall v. Conder*, 2 C. B. N. S. 22 40; *Chitty* on Contracts, 10th ed., 408; *Benjamin* on Sales, 2nd ed., 498; and at all events the plaintiff was a trustee of the logs for the Crown: *Gilmour v. Buck*, 24 C. P. 187, 194.

February 4, 1876. HARRISON, C. J., delivered the judgment of the Court.

Two questions arise for decision in this case.

1. Whether any defect is shewn in the plaintiff's title to the logs.

2. Whether such defect can, in an action for not accept-



ing the logs, be set up as a legal or equitable answer in whole or in part.

The evidence shews that the logs were cut in what is called the free-grant district. If at the time they were cut the plaintiff's patent had not issued he had no right to cut them. The fact whether at that time the patent had or had not issued is peculiarly within the knowledge of the plaintiff. In such a case very little affirmative evidence is sufficient to shift the onus of proof.

We think in this case there was sufficient affirmative evidence. What took place between the plaintiff and the defendant Alexander Cockburn if unanswered amounts to an admission on the part of the plaintiff that at the time the timber was cut the patent had not issued. There was no answer to it. The best answer that could have been made to it would have been the production of the letters patent. They were probably not produced because on production they would shew not only the issue at a date subsequent to the cutting of the logs, but that the patent was issued under the authority of 31 Vic. ch. 8, sec. 16, O.

If these were the reasons for the non-production—and it is, not in the absence of any other reason being assigned, presuming too much against the plaintiff, under the circumstances, to presume that they were—the objection of the insufficiency of the affirmative evidence on the part of the defendant is not to be greatly favoured when made by the plaintiff.

It is a general rule of evidence that in every case the *onus probandi* lies on the person who wishes to support his case by a particular fact, and of which he is supposed to be cognizant: per Ashurst, J., in *Dickson v. Evans*, 6 T. R. 57, 60.

If a negative averment be made by one party which is peculiarly within the knowledge of the other, the party within whose knowledge it lies, and who asserts the affirmative, is to prove it, and not he who avers the negative: per Bayley, B., in *Rex v. Turner*, 5 M. & S. 206, 211.

There should, however, be some evidence to start it in order to cast the *onus* on the other side : per Alderson, B., in *Elkin v. Janson*, 13 M. & W. 655, 662. See further *In re Barrett*, 28 U. C. R. 559; *Regina v. Strachan*, 20 C. P. 182.

The evidence of the admission to which we have referred is, we think, sufficient under these authorities to shift the *onus* of proof. There is other evidence, but this being in our opinion sufficient it is not necessary to refer to the other evidence.

Now the enquiry arises, what is the title to logs cut by a person located on a lot of land in the free grant district *before* his letters patent have issued?

It is by 31 Vic. ch. 8, sec. 4, provided that "The Lieutenant-Governor in Council may appropriate any public lands considered suitable for settlement and cultivation, and not being mineral lands or pine timber lands, as free grants to actual settlers, under such regulations as shall from time to time be made by order in council, not inconsistent with the provisions of this Act."

And by sec. 10, that "All pinetrees growing or being upon any land so located, \* \* shall be considered as reserved from said location, and shall be the property of Her Majesty, except that the locatee or those claiming under him or her, may cut and use such trees as may be necessary for the purpose of building, fencing, and fuel, on the land so located, and may also cut and dispose of all the trees required to be removed in actually clearing said land for cultivation, but no pine trees except for necessary building, fencing, and fuel as aforesaid, shall be cut beyond the limit of such actual clearing *before the issuing of the patent*, and all pine trees so cut and disposed of (except for the necessary building, fencing and fuel as aforesaid,) *shall be subject to the payment of the same dues as are at the time payable by the holders of licenses to cut timber or saw logs*. All trees remaining on the land at the time the patent issued shall pass to the patentee."

When we turn to Consol. Stat. C. ch. 23, "respecting the sale and management of timber on public lands," we find that it is made the duty of every person obtaining

a license to cut timber on Crown lands to make a sworn return of the number and kind of trees cut, and of the quantity and description of saw logs, or of the number and description of sticks of square timber manufactured and carried away under the license : sec. 3. That all timber cut under licenses shall be liable for the payment of Crown dues thereon, so long and wheresoever the timber or any part of it may be found, whether in the original logs or manufactured into deals, boards, or other stuff, and may be seized and detained wherever found until the dues are paid or secured : sec. 4.

Bonds or notes taken for Crown dues are not in any way to affect *the lien of the Crown on the timber* : sec. 5. And provision is made for the sale of it after twelve months detention without the dues and expenses being paid : sec. 6.

It is in the same Act declared that if any person without authority cuts timber on Crown lands he shall not acquire any right to the timber so cut : sec. 7 : that it may be seized wherever found : sec. 8 ; and that when so mixed up at the mills or elsewhere as to render it impossible or very difficult to distinguish the timber so cut on public lands without license from other timber with which it is mixed up, the whole of the timber so mixed shall be held to have been cut without authority on public lands, and be liable to seizure and forfeiture accordingly, until satisfactorily separated by the holder : sec. 8, sub-sec. 2 ; and that whenever any timber is seized for non-payment of Crown dues, and any question arises whether the dues have been paid on the timber, or whether the timber was cut on any other than the public lands, the burden of proving payment or on what land the timber was cut shall be on the owner or claimant of the timber : sec. 10, sub-sec. 2.

There is no exemption in either of these acts of timber cut for home consumption.

In *Hughson v. Cook*, 20 Grant 238, at p. 241, the learned Chancellor intimated that the provisions of section 10 of the Act of Ontario amount to a prohibition to the locatee to cut

Crown timber for any other than the purposes specified before patent issued, that his location carries with it only a qualified interest, and that all pine trees with the exceptions specified remain the property of the Crown and cannot and do not pass to the locatee, and therefore that the locatee has no power to sell so as to pass title to timber so cut.

Following up this view he also intimated that if the order in council of March, 1871, was intended to confer upon locatees the right to sell or dispose of pine timber upon their lots, that it was in his judgment *ultra vires* as being inconsistent with the provisions of both sections 10 and 12 as he interpreted them.

If this view be correct, it would follow that the plaintiff had no right or power to pass title to the logs in question to the defendants, except as to the logs cut for the purpose of clearing a small portion of the lot for cultivation, and there was no evidence to shew that any given number of the logs in respect to which he sues were cut on that portion.

But whether this view be right or be wrong, it is obviously to the interest of the plaintiff that the order in council, which assumes to recognize the right of the particular locatees to sell or dispose of all pine trees standing or being on lots located, subject to the payment of timber dues, be taken as proved.

If we were to give effect to his objection and rule that there was no evidence of it, we should certainly place him in a worse position than if we were to hold that there is some evidence of it.

The notice put in by defendants, without objection by the plaintiff, reciting some such order in council, is some evidence of it, as well as the amount of the dues, especially when taken in connection with the testimony that all the Crown claims is the payment of the dues on the logs in question.

Under these circumstances, as the question of title does not arise between the plaintiff and the Crown, but between



the plaintiff and his vendees, the Crown appearing only to claim a lien for dues, we must give effect to the claim to the extent that it is asserted, and hold that the timber in question is to be looked upon as timber cut under a license, and so subject to dues and to a lien in favour of the Crown till the dues be paid.

The amount of the lien is \$111, and to that extent there is an incumbrance on the logs sold by the plaintiff to the defendants, and which the defendants must pay, or submit to the seizure, forfeiture, and sale of the logs or a sufficient portion of them to defray the amount of the lien.

We shall now proceed to the consideration of the second question raised for decision in this case.

It is contended by the plaintiff that as at the time of the sale there was no express warranty of title none is to be implied, and that the rule *caveat emptor* applies.

The law of England as to when a warranty of title will or will not be implied in a sale of goods is not entirely free from doubt.

The rule of the civil law as given by *Pothier* is as follows: "The vendor's obligation is not at an end when he has delivered the thing sold. He remains responsible after the sale to warrant and defend the buyer against eviction from that possession. This obligation is called a warranty:" *Pothier*, Vente, part 2, ch. 1, sec. 2, No. 82.

"By the civil law every man is bound to warrant the thing he selleth or conveyeth, albeit there be no express warranty, but the common law bindeth him not, unless there be a warranty, either in deed or in law; for *caveat emptor*" &c.: *Co. Litt.* 102*a*. See also, *Noy's Maxims*, 42.

Blackstone says the rule is different as to goods, if the vendor "sells them as his own:" 2 *Black.* 451.

The first decision in England of which we have any record is, according to Mr. *Benjamin* in his learned work on Sales of Personal Property, 2 ed. p. 516, *L'Apostre v. L'Plaisitier*, mentioned in 1 P. Wms. 318, as a decision on a different point, but when it was cited as an authority in *Ryall v. Rowles*, 1 Ves. 348, Lee, C. J., sitting with Lord

Chancellor Hardwicke, said, "My account of that case is different from that in *Peere Williams* \* \* \* It was held by the Court that offering to sell generally was sufficient evidence of offering to *sell as owner*, but no judgment was given, it being adjourned for further argument."

In *Dickenson v. Naul*, 4 B. & Ad. 638, where an auctioneer employed by a supposed executrix sold goods of the testator, but before payment the real executor claimed the money from the buyer, it was held that the defendant was not liable to pay the auctioneer for the goods.

In *Allen v. Hopkins*, 13 M. & W. 94, a somewhat similar case, *Dickenson v. Naul* was approved, Pollock, C. B., saying, at p. 102, "It appears to us, that the defendant was placed in no such difficulty; that he had a right simply to say as he has done, that the plaintiff had no authority to sell the goods in question, as the property in them was in another, and that he had discovered that person, and paid him the value of the goods. It was put in the argument, on the ground of *caveat emptor*. I certainly can find no authority, and I have no recollection of ever hearing that doctrine applied to this case, that the buyer is bound to take care that the plaintiff has a good title to the goods; and that, if it turn out that the plaintiff has not a good title, the buyer of the goods should have taken care of that before he made the contract, and therefore is bound by the contract, notwithstanding he is able to prove that the seller had no title. The doctrine of *caveat emptor* applies not at all, as I apprehend, to the title of the plaintiff, but to the condition of the goods."

But in *Morley v. Attenborough*, 3 Ex. 500, which was the case of a pawnbroker selling an unredeemed pledge, the Court held, with certain exceptions, that the rule *caveat emptor* applies, that there is no implied warranty of title in the contract of sale of a personal chattel, and that in the absence of fraud a vendor is not liable for a defect of title, unless there be an express warranty or *an equivalent to it by declaration or conduct*.

In *Chapman v. Speller*, 14 Q. B. 621, which was an

action for goods sold at a sheriff's sale, it was held that there was nothing equivalent to a warranty by declaration or conduct, the defendant having bought simply the interest of the execution debtor.

Patteson, J., however, in delivering judgment said, at p. 624, "In deciding for the defendant under these circumstances, we wish to guard against being supposed to doubt the right to recover back money paid upon *an ordinary purchase* of a chattel, where the purchaser does not have that for which he paid."

In *Sims et al. v. Marryat*, 17 Q. B. 281, an action in respect of the sale of a copyright, the conduct of the vendor was held to be equivalent to an express warranty of title, Lord Campbell saying, at p. 290, "I do not think it necessary to enquire what the law would be in the absence of an express warranty. \* \* \* The decision in *Morley v. Attenborough*, 3 Ex. 500, was that a pawnbroker, selling an unredeemed pledge as such, did not warrant the title of the pawnor. Of that decision I approve: but a great many questions, beyond the mere decision, arise on the very able judgment of the learned Baron in that case, which I fear must remain open to controversy. It may be that the learned Baron is correct in saying that, on the sale of personal property, the maxim of *caveat emptor* does by the law of England apply: but if so *there are many exceptions stated in the judgment which well nigh eat up the rule.*"

The rule as laid down in *Morley v. Attenborough* was followed in *Hall v. Conder et al.*, 2 C. B. N. S. 22, which was the sale of an alleged patent right.

But in *Eicholz v. Bannister*, 17 C. B. N. S. 708, which was an action in respect of goods sold in an open shop, C. J. Erle said, at p. 725, "I think justice and sound sense require us to limit the doctrine so often repeated that there is no implied warranty on the sale of a chattel. I cannot but take notice, that, after all the research of two very learned counsel, (C. Pollock and Holker), the only semblance of authority for this doctrine from the time of Noy and Lord

Coke consists of mere dicta. These dicta, it is true, appear to have been adopted by several learned judges, amongst others by my excellent brother Williams, whose words are almost obligatory on me; but I cannot find a single instance in which it has been more than a repetition of barren sounds never resulting in the fruit of judgment \* \* It is to be hoped that the notion which has so long prevailed will now pass away, and that no further impediment will be placed in the way of a buyer recovering back money which he has parted with upon a consideration which has failed."

In *Eicholz v. Bannister*, it was held that by selling in an open shop the defendant had so conducted himself as to bring himself within one of the recognized exceptions to *Morley v. Attenborough*, but it is difficult to understand why the fact of a sale in an open shop is more an affirmation of title than in any other shop, market, or place whatever.

In *Baguelly et al. v. Hawley*, L. R. 2 C. P. 625, which was an action in respect of the sale of a boiler set in brickwork, it was held, (Willes, J., *dissentiente*) that there was no conduct amounting to a warranty of title. The case does not appear to have been carried any further.

Mr. *Benjamin* in his very able work on Sales, 2nd ed., p. 522, has stated the result of the authorities as follows:—

"On the whole, it is submitted that, since the decision in *Eicholz v. Bannister* the rule is substantially altered. The exceptions have become the rule, and the old rule has dwindled into the exception, by reason, as Lord Campbell said, 'of having been well nigh eaten away.' The rule at present would seem to be stated more in accord with the recent decisions if put in like the terms following: *A sale of personal chattels implies an affirmation by the vendor that the chattel is his, and therefore he warrants the title, unless it be shewn by the facts and circumstances of the sale that the vendor did not intend to assert ownership, but only to transfer such interest as he might have in the chattel sold.*"



If it were necessary for the decision of this case to accept the result as stated by Mr. *Benjamin*, I should, after a careful perusal of the authorities, have little difficulty in doing so, and in doing so would hold that the plaintiff in this case by selling the logs as his, impliedly warranted that they were his, and that there are no facts or circumstances shewing a contrary intention.

But in *Morley v. Attenborough*, 3 Ex. 500, and running through all the cases following we find one exception within which this case may be brought without doing violence to any of the decided cases.

Lord Wensleydale, in giving judgment, at p. 509, says, "With respect to *executory contracts* of purchase and sale, where the subject is unascertained, and is afterwards to be conveyed, it would probably be implied that both parties meant that a good title to that subject should be transferred in the same manner as it would be implied under similar circumstances that a merchantable article was to be supplied. Unless goods which the party could enjoy as his own and make full use of were delivered the contract would not be performed. The purchaser could not be bound to accept if he discovered the defect of title before delivery, and if he did and the goods were recovered from him he would not be bound to pay, or having paid he would be entitled to recover back the price as on a consideration which had failed."

This case fairly and fully comes under the operation of the exception. We are glad of it, for we confess we have much less difficulty in finding the exceptions than in finding the rule.

The conclusion at which we have arrived is one that honesty, justice, and equity all demand in the dealings between man and man where one assumes to sell and another to buy *goods* and *chattels*, and not simply the *interest* which the seller may be *supposed* to have in them.

This conclusion would shew that at law the want of title is an answer in this case to the action for not accepting the goods sold.

But the defendant has pleaded his defence on equitable grounds, and in the words of Lord Chief Baron Richards in *Purvis v. Rayer*, 9 Price 488, 518, "it is a general rule in equity, founded on principles of honesty and the dictates of good sense, that if a person, generally speaking, offers anything for sale, the vendee, or he who becomes the purchaser, is entitled to see that the vendor has it with the qualifications, and in the way in which he, the vendee, understood that he bought it; that is, so as to afford him an assurance of having bought what he wanted, and meant to buy, or at least what was offered or professed to be sold,—or he may reject the contract."

We are much pleased to find that on this point Courts of law and equity are, independently of the provisions of the Administration of Justice Acts, so nearly in accord, and if it were necessary to draw them closer together for the more speedy, convenient, and inexpensive administration of justice in this case, we would not, under sec. 1 of 36 Vic. ch. 8, hesitate to make the attempt.

If the defect of title were total so as to entitle the vendee absolutely to refuse the goods, to accept them and not pay for them, or having paid for them to recover back the money as upon a consideration which has failed, we do not at present see any difficulty in this case (not being the case of a bill or note) in applying the same principles to the case of an incumbrance or partial failure of consideration. If the vendee were to pay the whole purchase money and could afterwards sue to recover the whole or a portion of it back as upon a consideration failed in whole or in part, it would be absurd to hold that he could not in an action for not accepting the goods, mitigate the claim by the amount of the incumbrance. And if any common law authority were necessary for this holding *Koster v. Holden*, 16 C. P. 331, S. C. 17 C. P. 139, an action on an agreement for the sale of real estate which at the time of the sale was encumbered, will, we think, be found a sufficient authority.

In that case Mr. Justice Wilson said, at p. 340 of 16 C. P., "It was, then, wrongful and idle to recover it (the purchase

money) from the defendant, because the consideration had then failed for the defendant's promise, and the defendant, if he had paid it, would have been entitled to have recovered it back again; and, therefore, he was entitled to resist its payment so as to avoid the needless circuitry of action which all this litigation would have occasioned."

We refer also to *Carey v. Guillow*, 7 Am. 494.

In *Dresser v. Ainsworth*, 9 Barb. 619, it was held that the implied warranty of title not only means that the vendor has a proper title to the goods sold, but that the same are unincumbered, and that the purchaser will acquire by the sale a title free and clear, and shall enjoy the possession without disturbance by means of anything done or suffered by the vendor. See further *Parsons on Contracts*, 5th ed., vol. i., p. 573, and notes.

We think the rule *nisi* must be discharged.

*Rule discharged.*

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McEACHERN V. SOMERVILLE ET AL.—McEACHERN V.  
WHITE ET AL.

*Survey—Plan—Work on the ground—Agreement—Misunderstanding.*

It appeared that no survey had been made on the ground of the 10th or 11th concessions of the township of Eldon north of the Portage road, but the patents had been granted according to a plan returned by the surveyor instructed to make the original survey; and by taking this plan, with the original instructions and field-notes, the lots could be found upon the ground. One D., a P. L. S., made a survey in accordance with this plan, by which the plaintiff's lot, 32, 10th concession, contained 200 acres, and defendant W.'s lot 32, 11th concession, 30 acres. While a dispute as to this line was pending the defendant W. induced the plaintiff to sign a document under seal, agreeing that the portion of the line between the 10th and 11th concessions opposite lots 32 be surveyed upon the same bearings as that portion of said line lying south of the Portage road. Defendant W., who was a sharp, intelligent man, knew that the effect of this would be to deprive the plaintiff's lot of 50 acres and add it to his own, while the plaintiff, who was illiterate and dull, was quite ignorant of this; and defendant W. assured him that if the effect of the agreement should be to reduce his, defendant W.'s, lot to ten acres he would be satisfied. The agreement was prepared at defendant W.'s instance, and the plaintiff signed it without taking any advice.

*Held*, that the plan and survey must govern, and that there was nothing in the agreement, if binding upon the plaintiff, to prevent him from asserting his title in accordance with them, or to divest him of any portion of his land.

*Semble*, however, that under the circumstances plaintiff would not be bound by the agreement.

DECLARATION: in each action the plaintiff complained in one count that the defendants broke and entered certain lands of the plaintiff, that is to say, the east half of lot 32 in the 10th concession of the township of Eldon; and in a subsequent count, of a conversion of a quantity of timber, the property of the plaintiff.

In the first case the pleas by the defendant Somerville were, to the whole declaration, not guilty; to the first count, leave and license; and by the remaining defendants, to the whole declaration not guilty, to the first count, land not the plaintiff's, and to the third count, goods not the plaintiff's.

In the second case all the defendants joined in pleading not guilty to the whole declaration; to the first count, land not the plaintiff's; and to the second count, goods not the plaintiff's.



Issue was taken by the plaintiff on the pleas. The plaintiff demanded that the issues should be tried by a jury, but afterwards, by a proper endorsement on the Nisi Prius record in each case, the jury was waived.

Both actions were tried before Richards, C. J., at the last Spring Assizes at Lindsay, without a jury.

In each case the learned Chief Justice rendered a verdict for the plaintiff.

The plaintiff claimed under a patent for the east half of lot 32, in the 10th concession, as expressed in the patent, "according to the original survey of the said township of Eldon," containing by admeasurement 100 acres, more or less, issued on 1st of May, 1868, to the plaintiff.

The patent for the west half of the same lot, as expressed by the patent, "according to the original survey thereof," containing by admeasurement 100 acres, more or less, was issued on the 3rd of February, 1873, to one James Sweeny.

The defendant claimed under a patent to one Joseph Fee, dated 17th of October, 1863, of lot 32, in the 11th concession of Eldon, containing by admeasurement 30 acres more or less.

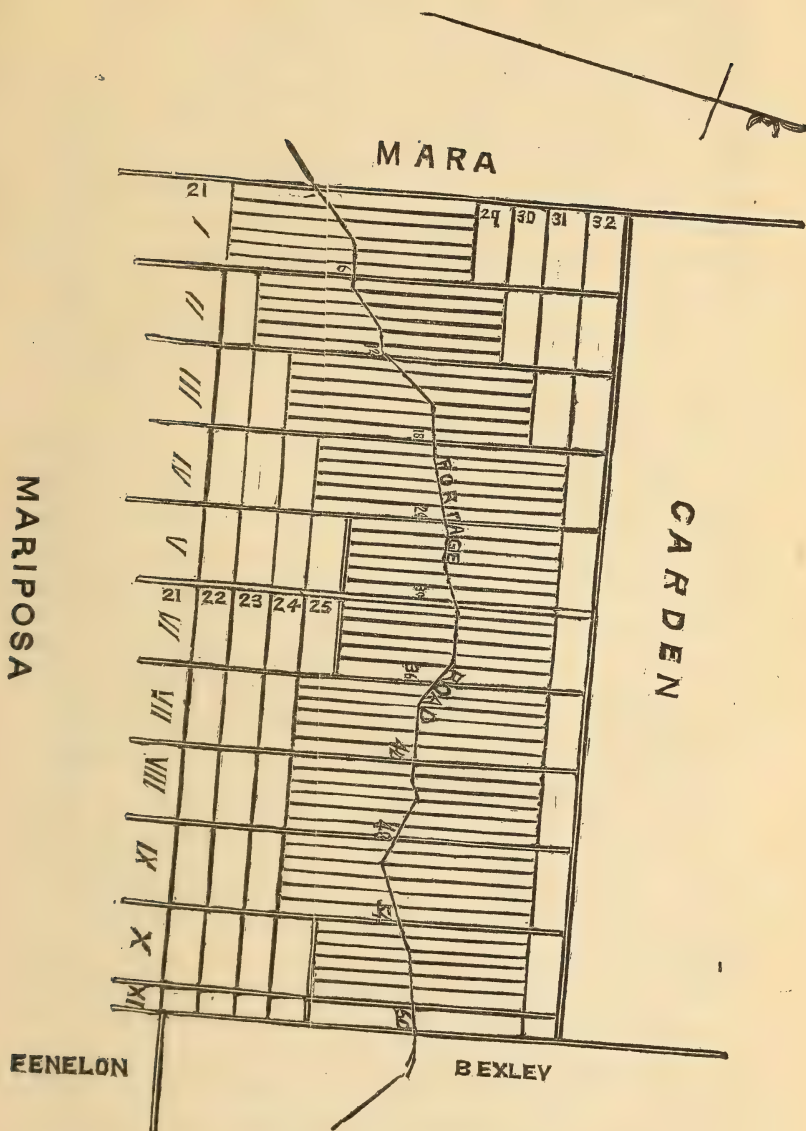
The lots appeared to have been granted in accordance with a plan in the Crown Lands Department, which is supposed to be a copy of the original plan by Ewing.

The situation of the lots is shewn on the plan on the opposite page.

The instructions for the survey of the township of Eldon were, on 1st of June, 1822, sent from the Surveyor-General's office to Henry Ewing, a deputy provincial land surveyor.

He was instructed to lay off the concessions from 1 to 11 each of the depth of 66 chains 67 links, excepting the last or 11th concession, which was to be 41 chains 11 links, more or less, as might be determined upon the ground.

Ewing returned his field notes and plan, shewing the lots in the 10th concession 200 acres, and in the 11th concession about 88½ acres.



Complaints were afterwards made to the Crown Lands Department to the effect that the lots in the 11th concession fell short of the quantity of land shewn on the plan.

On 16th November, 1841, instructions were sent from the Surveyor-General's office to Samuel Richardson, a deputy provincial land surveyor, to proceed to the township and examine carefully the town line between that township and Fenelon, and the line between the 10th and 11th concessions of Eldon, and report with as little delay as possible.

He having visited the township and examined the lines to which he was referred, on 21st December, 1841, reported to the department.

The following is an extract from his report :—

“ The line said to be between the 10th and 11th concessions, I am fully satisfied was never run or blazed on the ground, not speaking from information collected near the spot by the actual occupants, but from personal inspection in various places; but in order, if possible, to discover a line, chained from post 61 on town line, that is, from between lots 25 and 26, on a blazed line course S. 74° W., allowing at starting 50 links for allowance for road, at 5c. 59 passed post 61 and 60, at 17c. 10 do. 60 and 59, at 28c. 33 do. 59 and 58, and on our return passed a tamarack tree marked 58 and 57 at 48 chains to Grass River, free of timber each side for several chains, and abundance of wild grass and low shrubs; searched in vain the west side of the river for a continuation of the line, then opened and blazed the line to 73 chains through a tamarack swamp, latter part cedar; produced from 73 chains to 95 on hardwood land, with the intention of coming to the 9th and 10th concession line, which, if found, would give the depth of the 11th concession at that place; but think it doubtful whether a line was ever run here, unless we had traced it up from No. 1 or any other higher known number northerly; but the depth of the 11th concession, if the concession line was run between lots 11 and 12, would be 33c. 35 and allowance for roads, and between lots

2 and 3, 45.05 chains and allowance for roads, as shewn on accompanying diagram."

On 8th July, 1858, instructions were sent from the Crown Lands Department to John A. Roche, a deputy provincial land surveyor, to survey the concession lines in the township of Carden, north of Eldon, on a course N.  $19^{\circ} 37'$  west astronomically, and the side lines on a course N.  $70^{\circ} 23'$  east astronomically, and to survey the southern boundary of the township of Carden on a course S.  $70^{\circ} 23'$  west astronomically, so as to leave lot 32 in the township of Eldon, on the south side of it, to the width of at least 30 chains.

On 21st December, 1858, Roche reported that he made a careful examination for evidence in regard to the original survey of Eldon, in view of basing his operations upon its northern boundary; but finding from report that the original survey of this township had only been partially carried out on the ground, he proceeded to its north-east angle, where the original survey was most distinctly traceable, and from thence ran a trial line S.  $75^{\circ} 30'$  west magnetically, until he intersected the Talbot River, making a careful examination on the ground for any marks that might exist belonging to the original survey, but without finding any, with the exception of a post at the termination of the 7th concession line of Eldon. He then made a detour and reached the 4th concession of Eldon, at the termination of which he was shewn an old post as belonging to the original survey, but owing to its standing in four feet of water, was unable to search for any old line connecting with it. He next took a point upon the dry land, as near to it as practicable, and continued a trial line S.  $75^{\circ} 30'$  west of the north-west angle of Eldon, where he found an original post, from which he was enabled on a subsequent occasion to trace the original survey as far as the old post at the termination of the 4th concession line.

Lot 32 in the 11th concession was sold on 2nd March, 1860, as 30 acres, to one John Richmond, at \$1.60 per acre, and



he subsequently assigned to James Fee, who was the patentee and under whom the defendants claim.

In 1872 the defendant White appointed a deputy provincial land surveyor called Dean to survey some village lots for him on lot 32 in the 11th concession of Eldon. He found the south-east angle of the township of Carden. The north-east angle of 32 in the 11th concession was pointed out and sworn to by a person named George Richmond. These points were 31 chains apart, agreeing in this respect with the original field notes. He could not find any traces of an original line between the 10th and 11th concessions on lot 32. He sought for the line between the 9th and 10th concessions, but was unable to find any mark on the ground as to it. But Richmond said he could find it.

White and others petitioned the County Council for a survey of the line between the 10th and 11th concessions. They represented that in the original survey it had not been run in front of lot 32, and that the want of it was a great inconvenience. They recommended Mr. Dean as a proper person to make the survey.

On 5th April, 1873, such proceedings were had that instructions were sent by the Government to Dean to survey the line between the 10th and 11th concessions fronting lot 32, which he afterwards did.

He found that the line between the 9th and 10th concessions was not run in the original survey further than about 10 rods north of an original post between lots 27 and 28, where the survey was discontinued at Grass River. This defect in the survey caused his duties to be more difficult by involving the 9th concession for his consideration and action. He thereupon dealt with the undivided block of land, composed of lot 32 in the 9th concession, 32 in the 10th concession, and 32 in the 11th concession, as being adjacent concessions within the meaning of sec. 59 of Consol. Stat. C. ch. 77. He found the line between the 8th and 9th concessions, fronting lot 32, well defined and clearly marked on the trees. He traced it to its

intersection with the northern boundary. Thence measuring eastward along the northern boundary to the north-east angle of the township, he found the distance to be 140 chains 75 links, from which, deducting 2 chains for two road allowances and dividing the remainder (138 chains 75 links) proportionately to the intention of the original survey, he found the proportionate share of the 9th concession, patented as 200 acres, to be 64 chains  $53\frac{1}{2}$  links ( $193\frac{6}{10}$  acres); the 10th concession, patented as 200 acres, 64 chains  $53\frac{1}{2}$  links ( $193\frac{6}{10}$  acres), and the 11th concession, patented as 30 acres, to be 9 chains 68 links (29 acres).

He found the old line between the 8th and 9th concessions, fronting lot 32, to be parallel with the eastern boundary of the township. He thereupon drew the line between the 10th and 11th concessions, fronting lot 32, on the same course, bearing astronomically N.  $18^{\circ} 20' 29''$  W., and planted permanent monuments therein, giving to the 11th concession its proportionate depth of 9 chains 68 links. This survey was not confirmed.

In the previous year White learnt that this would be the effect of a survey made under the Act. He also discovered that if, instead thereof, if the portion of the 10th and 11th concessions opposite lot 32 were surveyed upon the same bearings as that portion of the line south of the Portage road, the effect would be to give his lot 32 in the 11th concession, about 80 acres to the loss of 32, in the 10th concession. The Portage road lots appeared to have been surveyed about ten years after the original survey.

White was an intelligent, sharp man. McEachern was in all respects the contrary. The latter could neither read nor write. He was anxious only to have his own land. On 13th of May, 1873, pending the dispute between him and White, the latter induced him to sign a document in the following form:—

“Know all men by these presents that we, the undersigned, do mutually agree that the portion of the concession line between the tenth and eleventh concession of the

township of Eldon, opposite lots 32, be surveyed upon the same bearings as that portion of said line lying south of the Portage road in the said township of Eldon.

"Witness our hands and seals this thirteenth day of May, in the year of our Lord 1873.

"JOHN WHITE (Seal).

"HENRY W. WYNNE (Seal).

his  
"WILLIAM + McEACHERN (Seal).  
mark

"JOHN McTAGGERT, *Witness.*"

Wynne was jointly interested with White in the ownership of lot 32, in the 11th concession. McEachern knew nothing of the bearings of the lots south of the Portage road. He did not know the meaning of the word "bearing," as applied to a survey. He was anxious to do right. He had no idea that he was likely to lose land by the agreement. White assured him that if the effect of the agreement would be to reduce his (White's) lot to ten acres he would be perfectly satisfied. He in no manner intimated that the effect would be to increase his lot from 30 to 80 acres, and to deprive McEachern of no less than 50 acres, or one-fourth of his lot. Had he done so McEachern never would have signed the agreement. The agreement was prepared at the instance of White. McEachern never had the advantage of consulting any professional man about it before signing it. He signed it in the honest simplicity that he was dealing with a man who simply wanted what was right, and would not take anything more.

It was agreed between the parties in *McEachern v. Somerville* that if the defendants were entitled to no more than 30 acres in lot 32, in the 11th concession, the damages to McEachern should be assessed at \$398, and that if the quantity of land in 32, in the 11th concession, were increased beyond 30 acres, the amount of damage should be reduced by the ratio of \$13.25 an acre.

It was also agreed that *McEachern v. White et al.* should abide the event of *McEachern v. Somerville*, and that unless

McEachern was bound by the agreement, the damages in that action should be \$97.20.

The learned Chief Justice held that there having been no survey north of the Portage road, between the 8th and 9th concessions, and the northern boundary of the township, the course pursued by Dean was the proper one. He thought that by taking the plan under which the lots were sold, the Government patents, and the scheme on which the lots were laid out, these lots could be found by going on the ground. The defendants' surveyor said that with these materials he could find the lots, and that Mr. Dean's work in that respect was satisfactory and correct. The learned Chief Justice therefore came to the conclusion that White's lot should be limited to 29 acres. He found that the Portage road lots were in fact a change of the original plan and of the original survey. He also found that the plan in the Crown Lands Department, according to which the sales were made, was from Ewing's original plan, and that the Portage lots were afterwards put on it. He held that as the portion of the township between the Portage road lots and the northern boundary of the township, is only one lot, of which no survey had in fact been made, that the plan and the descriptions from it, on which the lots were sold and conveyed, might be resorted to by applying them to the ground itself to find out what each man got by his deed from the Crown.

Next, as to the agreement. He was of opinion that White was a shrewd, sharp man, much superior in quickness and intelligence to McEachern: that he knew before he signed the agreement what would be the effect of extending the bearings of the lots south of the Portage road: that McEachern was ignorant of it, and that McEachern had, when he signed the agreement, no idea whatever of gaining a surplus. He therefore found that the arrangement, as between these two men, was not a fair one. He thought White's statement that he would abide by the line though he only got ten acres, was made to induce McEachern to enter into the agreement without the least



apprehension on his part of any such result. The learned Chief Justice was not satisfied that White was guilty of any positive misrepresentation, or had stated any falsehood to induce McEachern to enter into the agreement ; but the impression which the learned Chief Justice entertained was, that White was a clear-headed man, of great energy and activity, who knew precisely the effect of the arrangement he was making, whilst McEachern was a dull, sluggish man, who did not know the effect of what he was doing, but thought what he was doing was for his interest. In a word, the one knew that the agreement was vastly for his interest, and the other did not know its effect, and while McEachern supposed he was doing what was for his interest he was doing the reverse.

The learned Chief Justice did not think that McEachern could be held bound by the agreement to the extent of preventing him from asserting his right to the land. Besides, he did not think, looking at its proper construction, it could have any such effect.

He accordingly, in *McEachern v. Somerville et al.*, entered a verdict for the plaintiff for \$398, and in *McEachern v. White* entered a verdict for plaintiff for \$97.20.

Leave was reserved in each case to the defendants to move to enter a verdict for them if the learned Chief Justice was wrong in his finding or ruling.

During Easter term, May 22, 1875, *J. K. Kerr*, obtained a rule in each case calling on the plaintiff to shew cause why the verdict for the plaintiff should not be set aside, and a verdict entered for the defendants, pursuant to leave reserved at the trial, and pursuant to the Law Reform Amendment Act, and on the ground that the survey made by one Horning, according to which the defendants claim, was valid and binding on the parties, or truly described and defined the boundary between lot 32, in the 10th, and lot 32, in the 11th concession of Eldon, and according to such survey and the agreement for the same the plaintiff was not entitled to recover ; or why a new trial should not be had on the grounds aforesaid.

In Michaelmas term, December, 1875, *J. D. Armour*, Q. C., and *Hector Cameron*, Q. C., shewed cause. As there never had been an original survey of the lots in question, the map in the Crown Lands Department, according to which the lots were granted, must prevail. According to it lot 32, in the 10th concession, is 200 acres, and lot 32, in the 11th concession, 30 acres. Dean's survey gives as nearly as possible these quantities to the lots, and therefore is as nearly as possible in accordance with the intention of the Crown when granting the lots. There is nothing on the face of the alleged agreement which should have the effect of preventing McEachern asserting his rights to the whole quantity of land to which he is entitled under his patent, and if the agreement, on the face of it, can be held to have any such effect, it is not, owing to the circumstances under which it was executed, binding on the plaintiff.

*J. K. Kerr*, contra.—Ewing had made an original survey of the lots in question, although no stakes could now be found. There is nothing to discredit his survey, except that later surveyors cannot find his monuments: *Smith v. Clunas*, 20 C. P. 213. The lots south of the Portage road are a portion of his survey, and the bearings of them should be extended in accordance with his survey: *Consol. Stat. C.*, ch. 77, sec. 85; *Davis v. Waddell*, 6 C. P. 442; *Culp v. Culp*, 6 C. P. 466; *Richmond v. Ferris*, 6 C. P. 163; *Iler v. Nolan*, 21 U. C. R. 309; *Dixon v. McLaughlin*, 1 E. & A. 370; *Cartwright v. Detlor*, 19 U. C. R. 210; *Ellis v. Waddel*, 5 O. S. 639; and if so extended the defendants would have much more than 29 acres in lot 32, in the 11th concession.

February 4th, 1876. HARRISON, C. J., delivered the judgment of the Court.

The weight of evidence entirely supports the conclusion that Ewing made no survey on the ground of any portions of the 10th or 11th concessions of Eldon, north of the Portage Road.

There being no evidence of any work on the ground,

there is nothing to affect the operation which should otherwise be given to the plan in the Department, according to which the lots were granted.

The survey of Dean, according to the finding of the learned Chief Justice, appears as nearly as possible to agree with that plan. Surveyors say that with the aid of that plan, and without the aid of any posts on the ground they can on the ground trace the lots.

The plan shews lot 32 in the 10th concession to be about 200 acres, and lot 32 in 11th concession to be about 30 acres. A survey which would have the effect of making lot 32 in 11th concession about 80 acres, and of reducing lot 32 in 10th concession to about 150 acres, would certainly not be in accordance either with the plan or the patents.

We agree with the contention that work executed on the ground on a question of boundary must, when clearly proved, prevail against plan, field notes, or patents. See *Dunn v. Turner*, 3 C. P. 104; *Ovens v. Davidson*, 10 C. P. 302; *Carrick v. Johnston*, 26 U. C. R. 69.

But where there is literally no evidence or no satisfactory evidence of work on the ground, effect must be given to the plan and patents so far as they can be traced on the ground: *Juson et al. v. Reynolds*, 34 U. C. R. 134; *O'Donnell v. Tiernan*, 35 U. C. R. 181.

Sec. 85 of Consol. Stat. C. ch. 77, relied upon by Mr. Kerr, is inapplicable. It has no application to concession lines. It applies only to side lines or the limits between lots in a given concession.

It is, however, made the duty of a surveyor acting under secs. 58 and 59 of the same statute, when employed to survey concession lines or parts of concession lines not run in the original survey, so to draw his lines as to leave each of the adjacent concessions of a depth proportionate to that intended in the original survey.

We can only, in the absence of work on the ground in this case, judge of the original survey by the instructions, field notes, and plan. This is all that any

surveyor would have to guide him in endeavouring to find out the original intention as to the depth of the concessions. All these Mr. Dean had before him, and made a survey which appears to us to be the only proper one under the circumstances. The fact that it so closely agrees with the plan and the patents is cogent evidence of its correctness.

According to this survey, the plaintiff is entitled in each action to succeed, unless prevented by something contained in the agreement of 13th May, 1873.

If this document were not under seal we could not give any effect to it. It shews no consideration. The principle of law is, that if a contract be not founded upon a consideration it shall not be enforced unless ratified in such a way as may shew that it was deliberate and distinctly understood by both parties. The rule was without doubt intended to protect parties from mistake or fraud. The act of sealing was looked upon formerly as an act so solemn and deliberate that it was held, in the absence of fraud or deceit, conclusively to imply consideration. But now that sealing is no more solemn or deliberate than mere writing, the distinction between sealed and unsealed instruments, as to consideration, would appear to be unsustainable by reason. It must now depend for its existence on its antiquity rather than on its good sense. It has to a great extent been driven out of Courts of Equity, and no one will regret to see it banished, if necessary, by the Legislature from Courts of Law.

In several of the States of the American Union, by statute and otherwise, the want of consideration is allowed as a defence to an action on a contract, whether sealed or not. See *Swift v. Hawkins*, 1 Dallas 21; *Gray v. Handkinson*, 1 Bay 278; *State v. Gaillard*, 2 Bay 11; *Leonard v. Bates*, 1 Blackf. 173; *Solomon v. Kimmell*, 5 Binn. 232; *Case v. Boughton*, 11 Wend. 106; *Martin v. Burton Iron Works*, 35 Ga. 320.

But assuming consideration under the operation of the rule as to sealed instruments, we fail to find anything in this agreement which can be held to operate as a convey-



ance of any portion of the plaintiff's land to the defendant.

It is true that plaintiff has "agreed" that the portion of the concession line between the 10th and 11th concessions of the township, opposite lot 32, be surveyed upon the same bearings as that portion of said line lying south of the Portage Road in said township, and nothing more. He now refuses to perform the agreement.

His refusal to perform the agreement cannot be held to divest him of any portion of land acquired by him from the Crown under his patent, and to vest that portion in the defendant White. There is no such stipulation in the so-called agreement. In the absence of some such stipulation, the title must certainly remain just where it was, as if no such agreement had been executed.

All we have to do in this action is with the question of title. We fail to see that the agreement can have any such effect as contended for by the defendants.

If we were compelled to give such effect to it, we should be forced to enquire whether, under the facts proved, it should, as against the plaintiff, be allowed to have any operation at all.

In *Chitty on Contracts*, 5th ed., 593, it is said: "It has been held that where one party to a contract stands by and allows the other to enter into the contract under a delusion, of the existence of which he was aware and which he might have removed, the contract is void."

The authority cited is *Hill v. Gray*, 1 Stark. 434, where it was held by Lord Ellenborough that if the agent of the vendor of a picture knows that the vendee labours under a delusion with respect to the picture, which materially influences his judgment, and permits him to make the purchase without removing the delusion, the contract is void.

So in 1 *Parsons on Contracts*, 5th ed. 578, it is said: "The common law does not oblige a seller to disclose all that he knows, which lessens the value of the property he would sell. He may be silent, leaving the purchaser to inquire and to examine for himself or to require a warranty. He may be silent, and be safe; but if he be more than silent; if by acts, and

certainly if by words, he leads the buyer astray, inducing him to suppose that he buys with warranty, or otherwise preventing his examination or enquiry, this becomes a fraud of which the law will take cognizance. The distinction seems to be—and it is grounded upon the apparent necessity of leaving men to take some care of themselves in their business transactions—the seller may let the buyer cheat himself *ad libitum*, but must not actively assist him "in cheating himself."

In *Story* on Contracts, sec. 519, it is said: "A distinction should here be observed between the concealment of extrinsic circumstances, affecting the value of the subject matter of sale, or operating as an inducement to a contract, such as the state of the market; and the concealment of intrinsic circumstances appertaining to its nature, character, and condition, such as natural defects and injuries. In respect of intrinsic circumstances the rule is, that mere silence as to anything which the other party might by proper diligence have discovered, and which is open to his examination, is not fraudulent, unless a special trust or confidence exist between the parties, or be implied from the circumstances of the case. \* \* In respect to extrinsic circumstances, the rule is, that neither party is ordinarily bound to notify them to the other, and *mere* concealment will not nullify the contract. But the party concealing a fault must be careful to do *no act*, and say *no word*, indicative of his assent to any mistaken proposition by the other, and must play an entirely negative part, for if he do anything *positive*, he will render himself liable."

In this case it is apparent that White knew the plaintiff was under a delusion as to the effect of the contemplated survey, and that when he, White, spoke of being satisfied if he, White, should only receive ten acres by it, when he knew he would receive 80 acres, so far from being merely negative, White was positively assenting to the plaintiff's delusion, and gently driving him to act on the delusion to his own detriment and White's advantage.

Such conduct is certainly against good morals, and we

think, if necessary further to investigate, it would be found equally against good law. See *Smith v. Hughes*, L. R. 6 Q. B. 597; *Riley v. Spotswood*, 23 C. P. 318; *Laidlaw v. Organ*, 2 Wheat. 178, and other cases cited in note *k.* to 1 *Parsons on Contracts*, 5th ed., 578.

We are of opinion that the defendants' rule in each case must be discharged.

*Rules discharged.*



# A DIGEST

OF

ALL THE REPORTED CASES

DECIDED IN

## THE COURT OF QUEEN'S BENCH,

FROM EASTER TERM, 38 VICTORIA, TO HILARY TERM, 39 VICTORIA.

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### ACCEPTANCE AND RECEIPT.

*Of goods.*—See SALE OF GOODS, 1.

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### ACCORD AND SATISFACTION.

See MERGER.

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### ADMINISTRATION OF JUSTICE ACT, 1873.

See DIVISION COURTS, 1.

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### AGENT OF INSURANCE COMPANIES.

See INSURANCE, 1, 2.

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### AMENDMENT.

*Of Pleadings.*—See SALE OF GOODS, 2.

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### APPEAL.

*Drawing inferences.*—[Per PATTERSON, J. The power to draw inferences of fact when given by

consent is not confined to the Court below, but extends to the Court of Appeal. *Hood v. Commissioners of the Harbour of Toronto*, 72.

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### APPROPRIATION OF PAYMENTS.

See LIMITATIONS, STATUTE OF.

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### ARBITRATION.

See AWARD.

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### ASSAULT.

31 Vic. ch. 28, s. 60—*Action for penalty for assault at election*—"Every person convicted."—Sec. 60 of the 32 Vic. ch. 21, O., enacts that "every person convicted" of a battery committed during any part of the days whereon any election is to be held, within two miles of the place where such election is so held," &c., "shall incur a penalty of fifty dollars."



By sec. 77, all penalties imposed by the Act shall be recoverable by any person who will sue for the same by action of debt or information in any Court having competent jurisdiction. And it shall be sufficient for the plaintiff in any such action or suit to state in the declaration that the defendant is indebted to him in the sum of money thereby demanded, and to allege the particular offence for which the action is brought, and that the defendant has acted contrary to the Act.

It was held in the County Court that the words, "Every person convicted," &c., did not mean who had been convicted in some criminal proceeding, but that the offence might be proved, and the person "convicted," in this action.

On appeal, Wilson, J., was of opinion that the judgment below was right; Morrison, J., that it was wrong. The appeal therefore was dismissed. *Wilde v. Bowen*, 504.

## ASSESSMENT AND TAXES.

1. *Bank Stock—Appeal to the Court of Revision.*—*Held*, affirming the judgment below, 35 U. C. R. 126, that bank stock owned by a resident of Kingston in the Merchants' Bank, which had its chief place of business in Montreal, was personal property owned out of the Province, and therefore exempt from taxation; and that the assessment of such bank stock being wholly unauthorized and void, the owner was not bound to appeal against it to the Court of Revision; and was not estopped by having so appealed. *Nickle v. Douglas*, 51.

2. *Toronto Street Railway—Assessment of.*—*Held*, reversing the judgment in this case, reported in 35

U. C. R. 264, that the Toronto Street Railway was not assessable for those portions of the streets occupied by them for the purposes of their railway, as being land, within the meaning of the Assessment Act, 32 Vic. ch. 36, O. *Toronto Street R. W. Co. v. Fleming*, 116.

## ASSIGNMENT OF DEBT.

*Equitable assignment of debt.*—The defendant purchased goods from L., who said that he would draw on defendant through the Merchants' Bank, and did so; and the manager of the bank swore that he discounted the bill for L. on the faith of L.'s representation that defendant owed him the money and would call and accept it:—*Held*, that this was not sufficient to constitute an equitable assignment of the debt by L. to the bank; and that the payment of the draft by the defendant to the bank after L.'s insolvency, was therefore no defence against a purchaser of L.'s estate from the official assignee, in an action for the price of the goods. *Lamb et al. v. Sutherland et al.*, 143.

## AVERAGE.

See SHIPPING.

## AWARD.

*Mistake—Reference back.*—An arbitrator intended to award that the costs of the reference and award, as well as of the cause, should be paid by the defendant; but by the mistake of the clerk of the plaintiff's attorney, by whom the award

was drawn, the costs of the reference and award were omitted. The award was remitted back for correction, but on payment of costs by the plaintiff, as the mistake was not that of the arbitrator only.

The delay in moving from the 21st of August, when the award was made, until the 4th of December, was held sufficiently accounted for by the loss of the Nisi Prius record and submission. *Stewart v. Beattie*, 538.

### BANK STOCK.

*Assessment of.*—See ASSESSMENT AND TAXES, 1.

### BAWDY HOUSE.

See CONVICTION.

### BILLIARD TABLES.

*Power to regulate and license.*—A by-law fixing the sum to be paid for a license for billiard tables in a town at \$300, and enacting that it should be unlawful to have any internal means of communication between a room in which a billiard or bagatelle table was kept, and any place in which spirituous liquors might be sold:—*Held*, valid: that the sum charged was not excessive: that such a by-law was properly submitted to the electors under 37 Vic. ch 32, sec. 23, O., which was not confined to tavern licenses; and that the enactment as to means of communication was within the power to regulate and govern, and was not unreasonable. *Re Neilly et al. and the Corporation of the Town of Owen Sound*, 289.

### BILLS AND NOTES.

*Interest recoverable after maturity.*]  
—See INTEREST.

### BRIDGE.

*Repair of.*—See WAYS, 1, 4.

### BUILDING CONTRACT.

See FRAUDS, STATUTE OF, 1, 2.

### CARRIERS.

See RAILWAYS AND R. W. COS.—  
TELEGRAPH CO.

### CATTLE-GUARD.

*On Highway.*—See RAILWAYS AND R. W. COS., 2

### CHATTEL MORTGAGE.

*Description of goods—Evidence of identity—Distress—Breaking open window—Action therefor.*—Goods were described in a chattel mortgage &c., (describing them as “one kitchen table, four chairs,”) “all contained in and about the dwelling house and barn of the mortgagor, situate at or on lots,” &c.: *Held*, sufficient.

The mortgage contained a proviso that in case the mortgagor should attempt to sell or part with the possession of or to remove out of the county the goods, or any of them, the mortgagee might take possession of and sell them, and break open doors, &c., for that purpose: The mortgagee, claiming under this proviso, brought trover for the goods, which the defendant

had seized under a distress for rent. It appeared that the goods were seized in October in the house mentioned in the mortgage, which had been executed in the previous August, and were of the same kind and description as those set out in the mortgage: *Held*, sufficient evidence that they were the same goods as those mortgaged.

The defendant, it appeared, in order to seize the goods under the distress, broke into the house by forcing open the window: *Quære*, as to the right of action of the plaintiff (the mortgagee) therefor. A new trial was granted, in order to ascertain the facts more fully. *Nattrass v. Phair*, 153.

See MORTGAGE.

## CHOSES IN ACTION.

*Assignment of.*]—See ASSIGNMENT.

## CHURCH.

*Action by trustees for voluntary subscription.*]—See CORPORATION, 1.

## COLLATERAL SECURITIES.

*Right to retain.*]—See INSOLVENCY, 2.

## COMPOSITION AND DISCHARGE.

See INSOLVENCY.

## COMPROMISING OFFENCE.

*Under 37 Vic. ch. 32—Conviction for.*]—A conviction under 37 Vic. ch. 32, sec. 39, O., that one M. the defendant, did unlawfully attempt and

offer to compound, and offer to compromise, compound and settle with one R. a certain offence with which the said R. had charged the said M. for selling spirituous and intoxicating liquors without a license, with a view of stopping or having the said charge dismissed for want of prosecution: *Held*, bad, and quashed; 1. For not shewing that M. was a person who had violated any of the provisions of the Act: 2. For stating the charge in the alternative, with a view of stopping or having, &c.; and 3. For adjudging the defendant to pay a sum for costs, without saying to whom. *Regina v. Mabey*, 248.

## CONDITION PRECEDENT.

See SALE OF GOODS, 2.

## CONDITIONS.

*On policy of insurance—Waiver of.*]—See INSURANCE, 2.

*Of contract to carry.*]—See RAILWAYS AND R. W. COS., 4.

*Of sending telegraphic message.*]—See TELEGRAPH CO.

## CONSIDERATION.

See CONTRACT.

## CONTRACT.

1. *Consideration—Voluntary subscription to a church—Evidence.*]—Plaintiffs, trustees of a church, sued defendant, alleging that in consideration they would take down or remove the church held by them, for the purposes connected with the trusts set out in the deed conveying the land to them on which it stood, and

would rebuild it so as better to answer the purposes of said deed, defendant promised to pay \$160 to assist them in so doing.

*Held*, that the promise being voluntary was no objection, for the plaintiffs on the faith of it and of other promised subscriptions had rebuilt the church and incurred obligations, which would form a sufficient consideration. That the evidence, set out in the case, warranted the jury in finding that defendant's promise was made to the plaintiffs. *Berkeley Street Church v. Stevens*, 9.

*See* HUSBAND AND WIFE.

### CONTRIBUTORY NEGLIGENCE.

*See* RAILWAYS AND R. W. COS. 3.

### CONTROVERTED ELECTION.

*See* ASSAULT—PARLIAMENT.

### CONVEYANCE.

*See* PRESUMPTION OF CONVEYANCE.

### CONVICTION.

*Statement of time and place.*—A conviction for keeping a house of ill-fame on the 11th of October, and on other days and times before that day; *Held*, sufficiently certain as to the time.

The information described the parties as of the township of East Whitby, and had "County of Ontario" in the margin. It charged that they kept a house of ill-fame, but did not expressly allege that they did so in that township or county. The evidence, however, shewed that

their place, at which such house was kept, was in East Whitby, in which the justices had jurisdiction. *Held*, sufficient.

A *certiorari* to remove the conviction was therefore refused. *Regina v. Williams et al.*, 540.

*See* COMPROMISING OFFENCE.

### CORPORATION.

*Action by trustees of church for subscription—Corporate existence—Pleading.*—1. The plaintiffs sued as "The Trustees of the Toronto Berkeley Street Congregation of the Wesleyan Methodist Church in Canada in connection with the English Conference," alleging that in consideration that they would take down or remove the church held by them for the purposes connected with the trusts set out in the deed conveying the land to them on which it stood, and would rebuild it so as better to answer the purposes of said deed, defendant promised to pay them \$160 to assist them in so doing:

*Held*, 1. That under *non assumpsit* only the defendant could not deny that the plaintiffs were a corporation, or had a right to sue or contract in a *quasi* corporate capacity, but that he should have put that fact in issue by a plea; and that the plaintiffs therefore were not bound to produce their deed. 2. That the plaintiffs being entitled to sue in such capacity their individuality was merged therein, and the objection that the defendant being a trustee was also one of the plaintiffs could not arise. *Berkeley Street Church v. Stevens*, 9.

2. *Public company under 27—28 Vic. ch. 23—Shareholder's liability.*—Certain shares in a company incorporated by letters patent issued



under 27-28 Vic. ch. 23, were allotted by resolution of the directors among themselves at 40 per cent. discount, their then supposed value, and scrip issued for them as fully paid up. G. acquired shares under this arrangement, which he assigned to the defendant for value, representing them as being fully paid up; defendant enquired of the secretary of the company who also informed him that they were fully paid up shares, and he accepted them in good faith as such, and about a year afterwards became a director in the company. The shares appeared as fully paid up in the transfer book and other books, but the true state of the case could have been ascertained by reference to the ledger and journal.

*Held*, under an equitable plea raising the defence in equity, that defendant before purchasing had made sufficient enquiry, and that he was not liable to a creditor of the company for the amount unpaid on the shares. *McIntyre v. McCracken*, 422.

[This case has been since reversed on Appeal.]

3. *Imperial Joint Stock Company's Acts—Action against company here—Set-off—Staying proceedings.*—To an action by the plaintiff for salary against a company incorporated under the Imperial Joint Stock Company's Acts, the defendant pleaded a set-off. It appeared that the plaintiff and one H. held shares which had been issued as paid up, but that the fact not having been registered as required by the statute, they had been placed on the list of contributories under the Winding-up Acts in England, as liable for the debts of the company to the extent of their shares. The plaintiff also held similar shares in his own name.

*Held*, that under a special equitable plea the defendants might set-off the alleged unpaid shares held by the plaintiff, but not those held by the plaintiff and H.; and that their proper remedy, therefore, was, to apply to stay the action under the equity of the Imperial Acts, which application might be made to this Court.

*Semble*, that the action should be stayed, and all matters concerning the company left to be dealt with under the Winding-up Acts in England. *Howell v. Dominion of Canada Oils Refinery Co., Limited*.

See MUNICIPAL CORPORATIONS.

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## COSTS.

*Mistake of arbitrator—Reference back.*—See AWARD.

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## COVENANT.

*Not to assign.*—See LEASE, 2.

*For quiet enjoyment.*—See LEASE, 3.

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## CRIMINAL LAW.

See COMPROMISING OFFENCE. — CONVICTION.

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## CROWN LANDS.

See EVIDENCE—SALE OF GOODS.

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## DAMAGES.

See TRESPASS, 2.

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## DIVISION COURTS.

1. *Administration of Justice Act, 1873, secs. 24. et seq.*—The Adminis-

tration of Justice Act, 1873, secs. 24, *et seq.*, authorizing the examination of parties to a suit, &c., does not apply to Division Courts. *Willing et al. v. Elliott*, 320.

2. *Office.*]—There is no obligation upon a municipality to provide an office for the Clerk of the Division Court. *Griffin v. The Corporation of the City of Hamilton*, 519.

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DEED.

*See* PRESUMPTION OF CONVEYANCE.

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DEMURRER.

*See* PLEADING.

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ELECTION.

*See* PARLIAMENT.

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EQUITABLE ASSIGNMENT.

*See* ASSIGNMENT.

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ESTOPPEL.

*See* ASSESSMENT AND TAXES, 1.

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EVIDENCE.

*Sale of timber—Right of purchaser to deduct Crown dues—Warranty of title—36 Vic. ch. 8, O.—Evidence.*]—The plaintiff agreed to sell to defendants certain timber which he was about to cut on a lot in the Free Grant district, of which lot he was in occupation on or before the 30th of September, 1871. He cut it and delivered the logs at the place agreed upon, but the Government made a claim of \$111 upon them for timber dues, for which they would be liable

in case the plaintiff had not before cutting the trees obtained his patent. There was no positive proof of this, but defendant swore that he told the plaintiff he had better not be in a hurry about cutting it, as he would soon have his patent, when there would be no dues, but that in the meantime there would be, to which the plaintiff replied that the local agent had informed him there would be no dues.

*Held*, that this being unanswered, amounted to an admission on the plaintiff's part that the patent had not issued when the timber was cut, and was sufficient affirmative evidence of the fact, which was one peculiarly within the plaintiff's knowledge.

The defendants, without objection, put in a notice published by the Crown Lands Department, that pursuant to an Order in Council of the 4th October, 1871, the Government would recognize the rights of all locatees of free grant lands before the 30th of September, 1871, to sell the pine thereon subject to certain dues. *Held*, that this was some evidence of the Order in Council, especially when taken in connection with the testimony that the Crown claimed only a lien for the dues.—*Brown v. Cockburn*, 592.

*Power to draw inferences of fact.*]—*See* APPEAL.

*See* CONVICTION — PRESUMPTION OF CONVEYANCE — SURVEY — TELEGRAPH CO.—TORONTO HARBOUR.

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EXAMINATION OF PARTIES.

*See* DIVISION COURTS.

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FARM CROSSING.

*See* RAILWAYS AND R. W. COS. 1.

## FIXTURES.

### *Landlord and tenant—Surrender.*

—An engine and boiler put into a carpenter's shop and manufactory of agricultural implements: *Held*, to be trade fixtures as between landlord and tenant, and removable by the tenant. *Pronguey v. Gurney et al.*, 347.

## FOREIGN JUDGMENT.

*Sale under.*—*See* MORTGAGE.

## FORFEITURE OF LEASE.

*See* LEASE, 5.

## FRAUD AND MISREPRESENTATION.

*In taking out policy.*—*See* INSURANCE, 1.

*See* PLEADING—SURVEY, 2.

## FRAUDS, STATUTE OF.

1. *Promise to answer for the debt of another.*—One A. had contracted to build certain houses for defendant, and the plaintiff agreed with A. to do the brickwork; but having some doubts as to A.'s ability to pay, the plaintiff hesitated to go on. The defendant told the plaintiff he would see him paid, whereupon the plaintiff proceeded and finished the work.

*Held*, that the defendant's promise was within the Statute, and being verbal only the plaintiff could not recover, for A.'s liability to the plaintiff continued, and defendant's only liability arose from this promise. *Bond v. Treahy*, 360.

2. *Guarantee.*—A. contracted to

build houses for defendant, and sublet the plastering to the plaintiff. The plaintiff commenced the work, but refused to go on without security, whereupon A. gave him a written order to the architects to give him certificates for the plastering as the work proceeded. After this the plaintiff got money from time to time from the architects without reference to A. A. failed, and the plaintiff stopped work for some weeks, when the defendant told him to go on, saying he, the plaintiff, knew all was right; and he thereupon went on and completed the work.

*Held*, that there was no substitution of the plaintiff for A., but that A.'s liability continued; and that defendant's promise being collateral, and verbal, was void, under the Statute of Frauds. *Poucher v. Treahy*, 367.

*See* SALE OF GOODS, 1.

## FREE GRANT LANDS.

*See* EVIDENCE.

## GENERAL ISSUE.

*See* PLEADING—TRESPASS, 1.

## GRAVEL.

*Removing from Highway.*—*See* WAYS, 2.

## GUARANTEE.

*See* FRAUDS, STATUTE OF, 1, 2.

## HARBOUR.

*See* TORONTO HARBOUR.

## HAWKERS AND PEDDLERS.

\* *Hawkers and peddlers—Effect—License.*]—*Quere*, whether the license to a hawker and peddler, granted under the Municipal Acts, is confined to the licensee only, or whether it extends to a servant employed by him. *Semle*, that it is personal only; but the point being doubtful, a *certiorari* was granted to remove the conviction of the servant, in order that it might be moved against. *In re Ford and McArthur*, 542.

## HIGH SCHOOLS.

See PUBLIC SCHOOLS, 1.

## HUSBAND AND WIFE.

*Married woman—Liability on contract*—35 Vic. ch. 16, O.]—A married woman owned land under the will of her father who died in 1865, having devised all his real estate to his widow for life, and on her death to his children in fee. By deed of partition between his daughters, of whom the defendant, who married in 1865, was one, and to which the defendant's husband and the widow were parties, certain lots were conveyed to defendant in severalty "to and for her separate use forever." Defendant's husband employed the plaintiff to build on this land, and the plaintiff rendered his account to the husband, knowing nothing, so far as appeared, of defendant in the matter.

*Held*, that the defendant was not liable; for, although the land was her separate estate, it could not be said that this work was done at her request or on her credit, or that there was any contract with her. *Wagner v. Jefferson*, 551.

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## IDENTITY OF GOODS.

See CHATTEL MORTGAGE.

## IMPROVEMENTS.

*Ejectment—Claim for improvements under 36 Vic. ch. 22, O.*]—Where in ejectment the defendant claims a lien for lasting improvements under 36 Vic. ch. 22, O., his right thereto must be enquired into and adjudicated upon in the action. *Quere*, how such lien, if established, is to be enforced, and whether the possession can be changed until it is satisfied. *O'Connor et al. v. Dunn*, 430.

## INSOLVENCY.

1. *Insolvent Act, 1869—Composition and discharge—Partnership and separate creditors—Proof of claim as surety—Mention of claim in statement—Pleading.*]—Declaration: for money paid by the plaintiff for T. H. and F. H.

Fifth plea, in substance, that T. H. and F. H., being co-partners in trade, on the 5th March, 1873, made an assignment in insolvency: that on the 17th a deed of composition and discharge was executed by the proper number and value of their creditors on certain terms, which were duly carried out by the insolvents: that there were no separate creditors of either of the insolvents: that the deed was duly confirmed by the Judge: that two notes became due in December, 1872, made by the plaintiff for the insolvents' accommodation, and were dishonoured, and were then and up to the payment of the composition held by the Bank of British North America: that the liability of the insolvents to the bank was set out in the statement of their affairs



at the first meeting of creditors, in which these notes were stated to have been made by the plaintiff for their accommodation: that the bank after the assignment delivered to the assignee their claim against the insolvents, and proved for the full amount of the two notes, and were creditors until they received the notes for the composition agreed upon: that they executed the deed and received the composition: and after they had proved their claim the plaintiff, as surety for payment of the notes, was obliged to pay to the bank the amount of the notes, less the composition received by the bank; and part of the plaintiff's claim herein pleaded to is for the said money so paid by him to the bank.

The sixth plea was the same as the fifth down to the last averment—of payment by the plaintiff to the bank—which was omitted: and it was alleged that it was agreed between the plaintiff and the bank, in respect of the same two notes, that the plaintiff should pay the bank one half of them, and that the bank, in order to realize the other half, should proceed against the insolvent estate for the whole: that the plaintiff accordingly paid one-half of said notes to the bank, and the bank proved for and received the composition upon the whole, and the money so paid by the plaintiff to the bank is part of the claim sued for and now pleaded to.

The seventh plea was to different sums from those already pleaded to. It followed the fifth plea down to and including the averment of the confirmation of the composition and discharge; and then alleged that the plaintiff had notice and knowledge of all said facts and of those herein-after mentioned: that a note for \$750 made by the plaintiff to and endorsed by the insolvents, and held by the

Bank of Montreal, became due and was dishonored in November, 1872, and another similar note for \$1,184, in December, 1872, held by the Ontario Bank: that these notes were made for the accommodation of the insolvent, of which the banks had notice: that the plaintiff before the assignment paid the said notes to said banks, and took them up, and was a creditor of the insolvents therefor, until the deed of composition: that part of the plaintiff's claim in this suit, and herein pleaded to, is for the money so paid: that all knowledge of such payments was purposely withheld from the insolvents by the plaintiff until after the first meeting of creditors after the assignment: that the liability of the insolvents for said two notes was mentioned in the statement of their affairs exhibited at said meeting; and the liability of the insolvents to the plaintiff for the amounts so paid by the plaintiff was shewn by a supplementary list of creditors previous to the discharge, and in time to permit the plaintiff obtaining the same dividend as the other creditors: that the plaintiff at the time of the assignment owed the insolvents \$179, which the assignee had the right to set off, and the insolvents were always ready to give notes for the composition of plaintiff's claim as required by the deed, but the plaintiff has always refused to prove his claim against the estate: that forthwith after the insolvents became aware of the plaintiff having paid said notes, they deposited with the assignee notes for the composition on plaintiffs's claim in accordance with the deed, after deducting said \$179, which notes remain ready for the plaintiff; and all things have been done, &c., necessary to make said deed binding on the plaintiff as if he were a party thereto.

Second replication, to the three pleas: that there were separate creditors of each of the insolvents at the time of the assignment and of the deed of composition and discharge and the plaintiff was not a party to, nor did he execute said deed.

*Held*, on demurrer, that the traverse of there being no separate creditors, as alleged in the pleas, was proper; but that the averment that the plaintiff did not execute the deed was no answer to the pleas, for under the facts there stated execution by him was unnecessary.

Third replication, to fifth plea: that the moneys pleaded to were paid by plaintiff to the bank before the bank had proved their claim on the notes, and the plaintiff at the date of the deed of composition was a creditor in respect thereof; and the insolvents never mentioned their liability to the plaintiff therefor in any statement of their affairs, or supplementary list, or in the deed; and said claim was never proved against the estate: *Held*, no answer to the plea, for that, upon all the facts set out, enough was not shewn to make the dealings of the assignee and of the insolvents with the bank as holders of the note unavailing.

The fourth replication to the sixth plea was the same as the third replication, and was *held* also bad.

Fifth replication to the seventh plea: that the plaintiff's name as a creditor, and the claim in that plea mentioned, were not mentioned in the statement exhibited at the first meeting of creditors, or in any supplementary schedule furnished in time to permit plaintiff to obtain the same dividend as other creditors. *Held*, replication good: that, under the Insolvent Act of 1869, there must be a statement of the creditors ex-

hibited at the first meeting of creditors, as well as of the insolvent's affairs; but that the statement presented at the first meeting, as set out in the plea did sufficiently describe the plaintiff as a creditor; and as the plea therefore alleged that he was so specified, the plaintiff had a right to traverse it. *Preston v. Hunton*, 177.

2. *Composition and discharge—Securities* ]—After an assignment in insolvency in 1875, a deed of composition and discharge was executed, by which the insolvent covenanted to pay 30 cts. in the \$, and give each creditor endorsed notes therefor, and the creditors in consideration thereof released him from all their respective claims, "saving and reserving the rights which any of them may have against any other person, or in respect of any security held by them or any of them."

A. & Co., who were creditors executing the deed, had a claim amounting to \$2,768, for \$800 of which they held collateral security in the shape of promissory notes, all over due except one for \$52. The composition on their claim, amounting to \$827, having been placed in the assignee's hands for them:—*Held*, that A. & Co. were entitled to it in full, and to retain their securities, and were not bound to value said securities. *In re Stern, an Insolvent*, 296.

See ASSIGNMENT.

## INSURANCE.

1. *Misrepresentation of material facts—Knowledge thereof by defendants' agent—Liability.* ]—Declaration on a policy of insurance against fire of the plaintiff's grist mill.

Fourth plea—That by the policy it was agreed that the plaintiff's application, on which the policy was granted, and the survey and diagram of the premises, and all things therein contained, should be taken as part of the policy, and that if the insured should therein make any erroneous representation, or omit to make known any fact material to the risk, the policy should be void. And the defendants alleged that there was a wooden building 58 feet from the insured premises, which was a fact material to the risk, and to be known to defendants, yet the plaintiff in said application and diagram erroneously represented that said building was 100 feet from said insured premises, whereby said policy was void.

In the fifth plea, after setting out the same condition, defendants alleged that there was a wooden building not shewn on the plan or diagram near the insured premises, which was material to the risk; but that the plaintiff erroneously omitted it.

The ninth plea alleged that the plaintiff erroneously and falsely represented the cash value of the insured premises to be \$9,000, which was a material fact, yet that they were worth much less, as the plaintiff well knew.

The plaintiff replied to the fourth plea: that the insurance was effected, through one M., an agent of the defendants, having authority to solicit, make out, and forward applications, to deliver policies when returned, and to collect and transmit premiums: that said agent personally inspected the property, and was fully aware of its position, and of the distance therefrom of the wooden buildings mentioned; and said application and diagram was filled up with the knowledge and approbation

of said agent, and transmitted by him to defendants, and neither they nor he objected to the said buildings, or notified the plaintiff that his policy was affected thereby; and further, that there was no fraud or fraudulent representation by the plaintiff in reference to the distance of said wooden building from the property.

There was a similar replication, in substance, to the other two pleas.

*Held*, (HARRISON, C. J., dissenting) that the replications were bad, for that on the admitted facts the plaintiff knowingly concurred with defendants' agent in a misrepresentation to defendants of material facts, which was a fraud upon defendants; and the denial of fraud was therefore immaterial.

Per WILSON, J.—The power of the agent to bind the company by accepting an application false to his own and the applicant's knowledge could not be assumed from his powers as specified in the plea, though they might afford evidence from which a jury might infer such power.

Per HARRISON, C. J.—Fraud or collusion on the plaintiff's part could not be assumed in the face of the replications denying, and in the absence of any rejoinder asserting it; the misrepresentations must be held, therefore, to have been simply mistakes made in good faith; and treating them as such, the defendants, under the facts stated in the replication, would be liable. *Shannon v. The Gore District Mutual Fire Ins. Co.*, 380.

2. *Condition against further insurance—Power of inspector to waive.*—One of the conditions of an insurance policy provided that if the



insured had at the time of the policy, or should have afterwards, any other insurance without the consent of the defendants written on the policy, the policy should be void.

The plaintiff relied upon a waiver of this condition by defendants' inspector, whose duty was described as being "to examine into the circumstances, to adjust the loss, and to settle or report to the office."

A nonsuit having been ordered upon the ground that the condition could not be waived by the inspector, or in any way except in writing:

*Held*, that the nonsuit was right upon the evidence; and the Court refused to set it aside.

*Quære*, whether, if the case had been left to the jury, and they had found that the agent had authority to waive the condition, the verdict could have been allowed to stand. *Mason v. The Hartford Fire Insurance Company*, 437.

## INTEREST.

*Promissory note—Interest recoverable after maturity.*—Where a day is named for payment of a note with interest at a rate specified the claim for interest after that day is a claim for damages, for breach of the contract, not as upon an implied contract, and is in the discretion of the Court or jury.

Where a note was made, in British Columbia, payable 150 days after date, with interest at two per cent. a month, the Court, under the circumstances stated in this case, allowed only six per cent. after maturity. *Dalby v. Humphrey*, 514.

## INTERPLEADER,

*See* TRESPASS, 2.

## JOINT STOCK CO.

*See* CORPORATION, 3.

## JUSTICE OF THE PEACE.

*Jurisdiction of.*—*See* CONVICTION.

*See* NOTICE OF ACTION.

## LANDLORD AND TENANT.

*See* FIXTURES—LEASE.

## LEASE.

1. *Proviso for sale and putting an end to the term—Construction.*—Declaration, that J. M., being seized in fee of certain land, let it by deed to defendant for 10 years, and the defendant thereby promised to pay him the yearly rent specified; and afterwards, during said term, J. M., by deed granted to the plaintiff all his reversion in the said land; and one year's rent became due, and remains unpaid.

Plea, that it was provided by said deed, that if J. M. should at any time have an opportunity to sell the said lot, then the said deed should be cancelled, and defendant should give up the place: that before any rent became due J. M. had an opportunity of selling and did sell said lot to the plaintiff, and by deed granted all his reversion therein to the plaintiff, as alleged; and said J. M., with plaintiff's concurrence, before said rent became due, gave notice to defendant that he had sold the said lot to the plaintiff, and that he then put an end to the lease, and said term was then put an end to before the rent accrued due.

*Held*, plea bad, per Richards, C.J., because the notice could not be given.



by J. M. after he had assigned his reversion, and it did not appear that the lease had been cancelled, or the term put an end to, or that defendant had given up the place. Per Wilson, J., because the sale alleged was not within the provision, being a sale of the reversion subject to the lease, not of the land with the immediate right of entry. *Pepper v. Butler*, 253.

2. *Act respecting Short Forms—Covenant not to assign—How far binding on assigns—Proviso for re-entry.*—A lease dated 1st July, 1868, purported to be made “in pursuance of an Act to facilitate the leasing of lands and tenements.” The proper title of the statute then in force, C. S. U. C. ch. 92, being “An Act respecting short forms of leases;” and it contained the following covenant. “and the said lessee, *for himself, his heirs, executors, administrators and assigns, hereby* covenants with the said lessor, *his heirs and assigns*, to pay rent and to pay taxes, and will not assign or sub-let without leave.” Then followed “Proviso for re-entering by the said lessor on non-performance of covenants, or seizure, or forfeiture of the term for any of the causes aforesaid.” The plaintiffs, as assignees of the lessor, brought ejectment, claiming to re-enter for breach of the covenant not to assign, by reason of an assignment of the lease made by the administratrix of the lessee.

*Held*, 1. That the reference to the statute was sufficient, notwithstanding the misdescription of its title.

2. That the covenant could not take effect under the statute, the short form given there omitting the words above italicised.

3. That the proviso for re-entry applied only to the non-performance

of positive, not negative covenants; and that there was, therefore, no right of re-entry here.

4. That there was no material difference between “re-entering,” the word used in the lease, and “re-entry,” the word used in the statute.

Richards, C.J., thought the weight of authority in favour of holding that the administratrix was not bound by the covenant not to assign, not being named in it, and that the proviso for re-entry applied only to positive covenants; but that in a Court of Appeal it might properly be held otherwise on both points.

Wilson, J., inclined to think the covenant one concerning the land, which would bind the assigns, though not named in it; but held that the proviso for re-entry did not apply to it. *Lee et al. v. Lorsch*, 262.

3. *Of rooms—Covenant for quiet enjoyment—Locking street door.*—The plaintiffs declared upon the covenant for quiet enjoyment in a lease to them by defendants of a flat in a building, above the flat occupied by defendants, together with all passages, ways, &c., to the said rooms belonging, alleging that defendants had disturbed them in their possession.

Plea, in substance, that the rooms were part of a large building, in which there were other rooms used as offices, to which access was obtained from the street by the door and staircase, which were used by the other tenants in common with the tenants of the rooms leased to plaintiffs: that the whole building was in charge of a caretaker employed by defendants, who were landlords of the whole, and for the safety and convenience of all kept the key of the street door, and locked it after the usual office hours, after which the

plaintiffs could at all reasonable times get the key and access to their rooms: that the demise was made subject to the right to use said door by defendants and the other tenants: and that the disturbance alleged was the locking of said door by the caretaker after office hours: *Held*, that the plea shewed no defence. *MacLennan et al. v. Royal Insurance Co.*, 284.

4. *Surrender.*—*Held*, also, that neither the increase nor reduction of the rent in this case, under the circumstances stated, operated as a surrender of the term and an acceptance of the new tenancy, so as to prevent the tenants from claiming the fixtures. *Pronguey v. Gurney*, 347.

5. *Lease—Construction—Forfeiture—Demand of rent.*—The plaintiff leased premises from defendant at a rent of \$150 a year, covenanting to pay rent, &c., and it was added "this lease will be void if the said plaintiff fail to perform this agreement."

*Held*, that the last clause would only make the lease voidable at the option of the lessor, not void; and that to entitle the lessor to determine the lease for non-payment of rent, a formal demand was necessary.

*Quære*, whether the words "this agreement" would apply to the covenant to pay rent. *Faugher v. Burley*, 498.

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### LICENSE.

*To Peddlers, &c.*—*See* HAWKERS AND PEDDLERS.

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### LIEN,

*For Improvements.*—*See* IMPROVEMENTS.

*See* SHIPPING.

### LIMITATIONS, STATUTE OF.

*Appropriation of payments*—In an action by an executor for services rendered by the testator as a labourer, on a monthly hiring, extending over many years, it appeared that payments had been made on account, at irregular intervals, both to the testator and to the plaintiff after his death, without any specific appropriation either by the defendant or the payee.

*Held*, that the plaintiff was entitled to have such payments applied to the earlier items which had become barred by the statute.

*Quære*, there being only the one claim, for continuous services, whether a jury might not infer that such payments were made on account, so as to take that part of the claim prior to the six years out of the statute. *Cathcart v. Haggart*, 47.

*See* PRESUMPTION OF CONVEYANCE—WAYS, 2.

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### LIQUOR, SALE OF.

*See* COMPROMISING OFFENCE.

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### MAGISTRATE.

*See* NOTICE OF ACTION.

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### MANDAMUS.

*See* PUBLIC SCHOOLS.

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### MARRIED WOMEN.

*See* HUSBAND AND WIFE.

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### MASTER AND SERVANT.

*See* NOTICE OF ACTION.

## MERGER.

*Agreement to convey land—Acceptance of deed—Effect of.*]—Plaintiff declared on defendant's agreement to sell him certain lands, and convey the same to him in fee simple free from all incumbrances—alleging in one count that he had not so conveyed, and in another that although defendant by deed pretended to convey the land to one H., at the plaintiff's request, free from incumbrances, yet defendant had allowed part of it to be sold for taxes. Defendant pleaded, that the incumbrances were created by a former owner, of which defendant had no notice, and which he was not legally bound to pay, and that afterwards he, at plaintiff's request, conveyed the land to H. by a deed with qualified covenants, which the plaintiff accepted, whereby defendant was released from said agreement.

*Held*, no defence, for there was no merger, because the deed was not to the plaintiff, no release was shewn, and no accord and satisfaction.

*Quere*, as to the effect of the deed if it had been given to the plaintiff. *McLellan v. Chequin*, 301.

## MEMORANDA.

50, 281, 323, 524.

## MISTAKE.

*Of arbitrator.*]—See AWARD.

## MORTGAGE.

*Purchase of property by mortgagee under foreign judgment—Effect of.*]—Declaration on a covenant to pay money. Plea, that the plaintiff sold a vessel to defendants, and

that the deed containing the covenant sued on was a mortgage and reconveyance thereof to the plaintiff to secure the purchase money. Equitable replication, that the vessel was seized and libelled for wages due to her crew, and condemned and sold in Detroit, in the United States, under the Admiralty law there, and the plaintiff purchased her for about \$2,300: that she was so sold without plaintiff's privity or consent: that by the foreign law the purchaser acquires an absolute and paramount title thereto, and purchased at the sale as any stranger might, and thereby bought the same absolutely, and not merely the interest or equity of redemption of the defendants therein as in the plea is alleged; and that he holds the same by title paramount, and not as a mortgagee having purchased the equity of redemption thereof; and that said mortgage did not thereby become merged and satisfied as alleged.

*Held*, on demurrer that defendant was not liable, for that the mortgagee could not sue for the mortgage money, while asserting his right to the property mortgaged wholly independent of any title derived from the mortgagor, and without any right to redeem. *Parkinson v. Higgins et al.*, 308.

## MUNICIPAL CORPORATIONS.

Are not obliged to provide an office for a Division Court Clerk. *Griffin v. Corporation of the City of Hamilton*, 519.

*Power to regulate, &c., billiard tables.*]—See BILLIARD TABLES.

See HAWKERS AND PEDDLERS. PUBLIC SCHOOLS, 1, 2. WAYS, 1, 2, 3, 4.



## NEGLIGENCE,

*In repairing bridge.*—See WAYS, 1, 4.

*In repairing highways.*—See WAYS, 2.

*In sending telegram.*—See TELEGRAPH COMPANY.

See RAILWAYS AND R. W. COS., 1, 2, 3.—TORONTO HARBOUR.

## NOTICE OF ACTION.

*Evidence of bona fides.*—A magistrate having entertained a case under the Master and Servant's Act, C. S. U. C. ch. 75, as amended by 29 Vic. ch. 33, D., and convicted the plaintiff, notwithstanding more than a month had elapsed since the termination of the engagement, and although he was told that he had no jurisdiction, and was shewn a professional opinion to that effect and referred to the statute: *Held*, that the jury were warranted in finding that he did not *bonâ fide* believe that he was acting in the execution of his duty in a matter within his jurisdiction; and that he was therefore not entitled to notice of action. *Cummins v. Moore*, 130.

## PARLIAMENT.

*Contested Election—Rejected votes—Evidence of the intention of such voters—Proof of agency—Corrupt practices.*—The decision of Wilson, J., 11 C. L. J. N. S. 163, affirmed on Appeal.

The petitioner upon a scrutiny of the ballots having a majority in his favour, it appeared that the names of eighteen persons upon the last revised assessment roll, and entitled to vote, were omitted from the copies

of voters' lists made for the purposes of the election, and their votes were rejected by the Returning Officer. Eight of them tendered their votes for the petitioner at the poll, and four others made affidavits that they wished to vote for him, which they left with the Returning Officer. The other six tendered their votes, but did not say for whom, but there was evidence that they declared at the poll, though not to the Returning Officer, that they would have voted for the petitioner.

*Held*, no ground for setting aside the election; for that it was competent to receive the evidence shewing how they intended to vote, and it was clear therefore that their rejection had not affected the result.

*Held*, also, upon the evidence, that one Peters was properly held not to have been an agent of the petitioner; and that the dinner given by him to forty electors at a distant polling place in the winter, where there was no inn, was not shewn to have been corruptly given or accepted, nor was there sufficient evidence that these persons all voted at the election. *Re North Victoria Election*, 234.

See ASSAULT.

## ORDER IN COUNCIL.

*Proof of.*—See EVIDENCE.

## PARTNERSHIP.

See INSOLVENCY, 1.

## PATENT.

*Proof that patent has issued.*—See EVIDENCE.



## PAYMENTS, APPROPRIATION OF.

See LIMITATIONS, STATUTE OF.

### PLEADING.

*Special Plea of fraud—Defence admissible under general issue—Demurrer.*—To a declaration on the common counts for freight, defendant pleaded, on equitable grounds, as to \$368, part of the money claimed, and being the difference between 90 cents and \$1 per ton, that the plaintiffs falsely and fraudulently represented to defendant's agent that defendant had agreed to pay them freight at \$1 per ton, and had chartered their vessel at that rate, whereas defendant had refused to pay them more than 90 cents per ton: that on the faith of such representations the agent delivered to them the coal, and received a bill of lading expressing the freight to be \$1 per ton, and the plaintiffs carried the coal and delivered it to the agent before defendant could forbid them.

*Held*, a good plea on demurrer, though unnecessary, the defence being admissible under never indebted. *Hammond et al. v. Conger*, 547.

See CORPORATION, 1—INSOLVENCY, 1—INSURANCE, 1.

## PRESUMPTION OF CONVEYANCE.

*Ejectment—Evidence of possession.*—In ejectment it appeared that the patent issued in 1823 to the plaintiff's mother, the daughter of an U. E. loyalist. She died in 1846 and her husband in 1865. Neither of them ever asserted any title, and the plaintiff never heard of the land in the family

until about three years ago, when he was informed that it was his by a stranger. The defendant produced the patent, and two deeds executed by one F. in 1828 and 1829, for the north and south halves of the lot, respectively, with a series of conveyances tracing title from F. to the defendants. There was evidence that F. did the settlement duties in 1821 or 1822, and made the affidavit of their performance; and that he lived on the lot for some years, but it seemed doubtful whether in fact possession was taken by any one until one W. entered in 1838. There had, however, been undisputed possession from that time, and the taxes had been paid by the respective occupants. F.'s daughter, who found the patent, proved that some of F.'s papers had been destroyed by her after his death and some burned during his lifetime, though she thought no deed was among them.

The learned Judge was against the defendants on the question of possession, (forty years' possession being required) but left the case to the jury, saying that, under the circumstances, it was competent for them to presume a conveyance from the patentee; and they found for defendants.

*Held*, that there was some evidence for the jury on both points, and the Court refused to interfere.

Remarks as to the doctrine of presumption in such cases, and its application under the circumstances of this country. *McLeod v. Austin et al.*, 443.

## PRINCIPAL AND SURETY.

See FRAUDS, STATUTE OF, 1, 2—INSOLVENCY, 1.

## PROXIMATE CAUSE.

See WAYS, 3.

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## PUBLIC COMPANY.

See CORPORATION, 2, 3.

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## PUBLIC SCHOOLS.

1. *High schools*—37 Vic., ch. 27, O.] —Held, under 37 Vic., ch. 27, O., that the High School Board for a district consisting of two municipalities, a town and township, could call upon one of the municipalities, the township, to contribute towards the erection of a school-house in the other municipality, and not merely towards its maintenance. *Re Niagara High School Board and the Township of Niagara, et al.*, 529.

2. *School Trustees*—*Application for mandamus to levy rate.*]—The trustees of a township school section sent to one of the councillors a notice signed by them, addressed to the reeve and councillors of the township, as follows: "Gentlemen,—You will please levy the sum of \$460 on the ratable property of school section No. 6, South Fredericksburgh, for the school purposes of said school section." This notice had no date. It was handed to one of the councillors, and the affidavits were contradictory as to his having been formally presented to the council, but the trustees were informed that the council would not act upon it, as it had no date.

Held, that such an application should be made through the township clerk: that the demand for a lump sum, simply for the school purposes of the section, is insufficient, for the corporation have a right to

know particularly the purposes for which the money is required; and *semble*, that the absence of a date would alone have been a fatal objection.

A mandamus to compel the corporation to levy the amount was therefore refused, but as the affidavits filed on shewing cause were unnecessarily long, the corporation were allowed only half their costs. *Re Public School Trustees of Section No. 6, in the Township of South Fredericksburgh*, 534.

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## QUI TAM ACTION.

See ASSAULT.

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## RAILWAYS AND R. W. COS.

1. *Accident at farm crossing—Liability.*] — The relative rights and duties of railway companies and landowners with regard to the use of farm crossings considered. The defendants in this case were sued for injury done to the plaintiff's cattle, which were killed by a train while they were crossing the railway at a farm crossing, where the line ran through the plaintiff's farm upon a level. Upon the evidence, set out below, the jury twice found for the plaintiff, acquitting the plaintiff of all blame, and finding the defendants guilty of negligence, in not keeping a sufficient look-out on rounding the curve before coming to the crossing, and the Court refused to interfere. *Bender v. The Canada Southern R. W. Co.*, 25.

2. *Railway crossing—Cattle-guard encroaching on highway—Accident—Liability—Contributory negligence.*] — The plaintiff, on a dark

night, intending to go to the railway station, walked along the highway until he came to the railway crossing, and then turned to the left intending to go along the track to the station, when he fell into the cattle-guard, which was within the limits of the highway, and was injured.

*Held*, that he could not recover, for assuming that the encroachment on the highway by the cattle-guard was illegal, it was in no way the cause of the accident, which resulted from the plaintiff leaving the highway to walk along the track, and would have happened without such encroachment. *Thompson v. The Grand Trunk R. W. Co.*, 40.

3. *Accident by car catching fire—Negligence—Contributory negligence.*—The plaintiff was a passenger in defendants' train, when he heard a lamp drop in the water closet or saloon at the front end of the car, and going forward with others saw a light in the saloon and some one trying to put out the fire. The fire broke out, and he tried to pull the bell rope, but found it would not work, and he then ran into the next car in front, the smoking-car, to pull the rope. The conductor had run forward, and the plaintiff supposing, as he said, that something had been done to stop the train, and thinking of his valise, and that there was danger of the car being burned, went back into the burning car and got it, and tried to return, but the fire broke out fiercely across the passage and prevented him. He was then driven to the rear end of the car, where the other passengers were crowding, and was seriously burned before the train stopped. The other passengers who went with him into the smoking-car remained there, and it was not burned. The defendants gave evidence

to shew that the lamp was of the best construction and well secured, and that the oil was of the best kind, such as would not explode or take fire from the lamp falling. The jury having found for the plaintiff:

*Held*, that there was some evidence from which the jury might infer that the lamp was not properly secured, and that the fire was occasioned by its fall in consequence; and that the omission to have a bell rope, as required by the statute, was negligence on defendants' part. But *Held*, also, that upon the evidence the damage to the plaintiff was caused, not by defendants' negligence, but by his own voluntary act in returning to the car. A nonsuit was therefore ordered. *Hay v. The Great Western R. W. Co.*, 456.

4. *Contract to carry—Conditions—Notice of claim—Liability.*—Defendants on the 5th of October, 1874, received goods at Montreal for the plaintiffs, addressed to the plaintiffs at Peterborough: "By the Grand Trunk Railway Company to Port Hope, thence by the Midland Railway." One of the conditions on which the defendants received the goods was, that no claim for damages to, loss of, or detention of goods, should be allowed "unless notice in writing, and the particulars of the claim for said loss, damage, or detention, are given to the station freight agent at the place of delivery within thirty-six hours after the goods in respect of which the said claim is made, are delivered."

The goods got to Port Hope on the 8th of October, but by some mistake one case was not given by the defendants to the Midland Railway till the 9th of November, and plaintiffs were advised of its arrival at Peterborough on the 11th. On the 12th



the plaintiffs wrote to the defendants' agent at Montreal, and to the station agent of the Midland Railway at Peterborough, that they had been advised of its arrival, but that they refused to accept it, because the delay had been most unreasonable, they had suffered loss through the detention, and had been compelled to re-order goods; and they required the defendants to compensate them for the loss sustained, and the value of the package. *Held*, that these letters were not a compliance with the condition.

*Held*, also, that the "place of delivery," mentioned in the condition above stated, was Peterborough, the place of delivery to the plaintiffs, not Port Hope, where the goods were to be delivered to the Midland Railway; and that such notice should be given to the station freight agent at Peterborough, who would be the person agreed upon to receive it.

*Held*, also, that such notice was required, though the place of delivery was off the defendants' line.

*Held*, also, that the defendants were under no obligation to give notice of the delivery of the goods by them to the Midland Railway.

Another condition was, that goods addressed to places beyond the defendants' line, and respecting which no direction to the contrary should have been received, would be forwarded by the defendants as opportunity might offer, by public carriers or otherwise, or might be suffered to remain in the defendants' warehouse, at the risk of the owner; but that the delivery by the defendants should be considered complete, and their responsibility cease, when the other carriers should have received notice that the defendants were prepared to deliver the goods to them; and that the defen-

dants would not be responsible for any loss or detention after arrival at their station nearest the place of consignment. The third count alleged that the goods were delivered to the defendants to be carried from Montreal to Peterborough, subject to this condition, (setting it out) amongst others, and averred that the defendants did not forward the goods to Peterborough within a reasonable time, but on the contrary, detained them at Port Hope in their warehouse. *Held*, that defendants were charged as carriers, and were so acting, not as warehousemen. *Mason v. Grand Trunk R. W. Co.*, 163.

*Assessment of Toronto Street R. W. Co.*—See ASSESSMENT AND TAXES, 2.

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## REGULÆ GENERALES.

*As to Term business.*—525.

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## RELEASE.

*See* MERGER.

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## SALE OF GOODS.

*Acceptance and receipt.*—The plaintiff, who lived in New York, agreed, at Orillia in this Province, through his agent, to sell to the defendants there certain goods, to be forwarded from New York by express. This agent had on the same day sold goods to W. T., another person in Orillia, and it was agreed between W. T., the agent, and the defendants, that the defendants' goods also should be directed to W. T. The goods for defendants and for W. T. were sent, as agreed upon, to W. T. in one case, and invoices were sent to W. T. and the defendants of their



respective purchases. W. T. was notified of the arrival of the goods in Toronto, and about the middle of July sent down the invoices to pass them through the customs, but they were passed and duties paid upon W. T.'s invoice only, and the Customs department believing that there was an attempt at fraud, seized the goods and sold them in September as forfeited. Neither the defendants nor W. T. had made any special enquiries after receiving the invoices and they never informed the plaintiff of the facts: *Held*, that this was a dealing with the goods by defendants through W. T., for whom they were responsible, which was evidence of an assumption of ownership, and of a receipt and acceptance sufficient within the Statute of Frauds; and that defendants therefore were liable in an action on the common counts for goods sold. *Tower v. Tudhope et al.* 200.

2. *Agreement — Condition precedent — Waiver — Amendment.*]—The defendant agreed in writing to buy from the plaintiff certain quantities of different kinds of lumber specified "culls all out, and all good merchantable lumber by G. F. or J. Sills's inspection."

The plaintiff sued upon this agreement, alleging that all things were done, &c., necessary to entitle him to have the lumber accepted, yet that defendant, having accepted part, refused to accept the residue. It appeared that part of the lumber had been shipped by defendants orders to one P. at Buffalo, and there was evidence of a new agreement as to the inspection, but no inspection had been made. It was also proved, without objection, that according to the usage in such cases it is the purchaser's duty to procure the inspec-

tor. At the trial, the case being taken in defendant's absence, it was held that defendant was bound to procure inspection, and that the declaration should have been for not doing so; and as an amendment was not accepted on the terms imposed, a verdict was entered for defendant.

*Held*, that under the contract the inspection by G. F. or J. Sills was a condition precedent to defendant's obligation to accept the lumber; but that defendant might waive this condition or agree to a different inspector. The Court however refused to amend and enter a verdict for the plaintiff; but granted a new trial on payment of costs, to enable the plaintiff to amend, and to have the question as to such alleged waiver and substitution properly tried. *Aitcheson v. Cook*, 490.

3. *Held*, also, that although there was no express warranty of title, this being an executory contract for purchase and sale of a subject unascertained and afterwards to be conveyed, (certain timber to be cut on a lot specified), the purchaser was entitled to a good title; and that in an action for not accepting he might deduct the amount of dues for which the Crown held a lien.

*Semble*, however, that in all cases of the sale of chattels, the vendor by selling them as his own impliedly warrants the title, unless the facts shew that he intended only to transfer his interest.—*Brown v. Cockburn*, 592.

*Under foreign judgment.*]—See MORTGAGE.

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## SALE OF LAND.

See EVIDENCE—MERGER.

SALVAGE.

See SHIPPING.

SCHOOLS.

See PUBLIC SCHOOLS.

SET-OFF.

See CORPORATION, 3.

SHAREHOLDER.

*In public Company.*—See CORPORATION, 2.

SHIPPING.

*Carriage by water—Vessel burnt in canal—Right to salvage and general average.*—The plaintiffs in October, 1873, shipped 92 tons of pig iron on the defendant's vessel at Montreal, to be carried to Hamilton. She accidentally caught fire in the canal on her voyage, and was destroyed, and the iron sank. The vessel was insured, but not the cargo, and the inspector of the Insurance Company, after consultation with the captain, made a contract for raising the hull, machinery, and cargo. The iron was piled up at the lock ready for shipping in the Spring, and was then sent on, but defendant claimed a lien upon it for a portion of the expenses incurred in raising the hull and engine.

*Held*, that there was no such lien: that the services rendered could not be considered as in the nature of salvage services, or general average, the iron not being in danger of destruction or loss; and that the master could not be considered as the plaintiffs' agent to make the con-

tract, for there was no difficulty in communicating with the plaintiffs and getting their instructions, and such implied agency only arises in case of necessity. *Gurney et al. v. MacKay*, 324.

See MORTGAGE.

STATUTES.

Administration of Justice Act, 1873, sec. 24.—See "Damages," 1.

Joint Stock Companies' Act (Imp.)—See "Corporation," 3.

Municipal Act, 1873, secs. 413-416.—See "Ways," 4.

C. S. C. ch. 66, sec. 83.—See "Ways," 2.

C. S. U. C. ch. 92.—See "Lease," 2.

27-28 Vic. ch. 23.—See "Corporation," 2.

29 Vic. ch. 33, D.—See "Notice of Action."

31 Vic. ch. 28, sec. 60, O.—See "Assault."

32 Vic. ch. 36, O.—See "Assessment and Taxes," 2.

32 Vic. ch. 21, secs. 60, 77.—See "Assault."

35 Vic. ch. 16, O.—See "Husband and Wife."

36 Vic. ch. 22, O.—See "Improvements."

37 Vic. ch. 32, sec. 23, O.—See "Billiard Tables."

37 Vic. ch. 27, O.—See "Public Schools."

37 Vic. ch. 32, sec. 39, O.—See "Compromising Offence."

SURRENDER.

See LEASE, 4.

SURVEY.

1. *Evidence of.*—The question being as to the position of the true line between lots 3 and 4 in the first concession of the township of York: *Held*, that the field-notes of a deceased surveyor of

a survey made in 1827, were rightly rejected, it not being shewn that the survey was made for the then owners of these lots. *O'Connor v. Dunn*. 430.

2. *Plan—Work on the ground—Agreement—Misunderstanding.*]—It appeared that no survey had been made on the ground of the 10th or 11th concessions of the township of Eldon north of the Portage road, but the patents had been granted according to a plan returned by the surveyor instructed to make the original survey; and by taking this plan, with the original instructions and field-notes, the lots could be found upon the ground. One D., a P. L. S., made a survey in accordance with this plan, by which the plaintiff's lot, 32, 10th concession, contained 200 acres, and defendant W.'s lot 32, 11th concession, 30 acres. While a dispute as to this line was pending the defendant W., induced the plaintiff to sign a document under seal, agreeing that the portion of the line between the 10th and 11th concessions opposite lots 32 be surveyed upon the same bearings as that portion of said line lying south of the Portage road. Defendant W., who was a sharp, intelligent man, knew that the effect of this would be to deprive the plaintiff's lot of 50 acres and add it to his own, while the plaintiff, who was illiterate and dull, was quite ignorant of this; and defendant W., assured him that if the effect of the agreement should be to reduce his, defendant W.'s lot to ten acres he would be satisfied. The agreement was prepared at defendant's instance, and the plaintiff signed it without taking any advice.

*Held*, that the plan and survey must govern, and that there was nothing in the agreement, if binding

upon the plaintiff, to prevent him from asserting his title in accordance with them, or to divest him of any portion of his land.

*Semble*, however, that under the circumstances the plaintiff would not be bound by the agreement. *McEachern v. Somerville et al.* — *McEachern v. White et al.*, 609.

## TELEGRAPH COMPANY.

*Neglect to send message—Liability—Evidence—Special conditions.*]—The plaintiff sent a telegram by defendants' company from Hamilton, addressed to one H. at New York, upon one of the blank forms furnished by defendants, which he had been accustomed to use. The terms, printed on the form, on which the company received the message, were—after stating that to guard against mistakes the sender of a message should order it to be repeated, that is, telegraphed back to the originating office, for which an additional charge would be made—that the company would not be liable for mistakes or delays in the delivery of unrepeatd messages, beyond the amount received for sending them; “and the company is hereby made the agents of the sender, without liability, to forward any message over the lines of any other company when necessary to reach its destination.” The plaintiff sued defendants, alleging that the message was never received, and that by defendants' neglect to deliver it he had lost the sale of certain wheat to which it related. The defendants' line terminated at Buffalo, where such messages were transferred to the Atlantic and Pacific Telegraph Company. H. having died, his clerk was called, who stated that he knew his business transactions: that this



message had not been received by H., and that he enquired at the Atlantic and Pacific Telegraph Co., and was told that they had not received it either.

*Held*, 1. That the evidence was insufficient to shew the non-transmission of the message, and that some one from the office of the Atlantic and Pacific Co., or of the defendants, should have been called. 2. That if this had been shewn defendants would not be liable, for the terms on which they received the message protected them; and that such terms were not unreasonable, and the plaintiff must be taken to have been aware of them. 3. *Seemle*, that the liability of telegraph companies cannot be treated as analogous to or co-extensive with that of a common carrier. *Baxter v. Dominion Telegraph Co.*, 470.

## TORONTO HARBOUR.

*Obstruction by sunken pier—Liability of Commissioners.*—The decision in *Hood v. The Commissioners of the Harbour of Toronto*, 34 U. C. R. 87, affirmed on appeal, holding that defendants were not liable for injury to the plaintiff's vessel caused by running against an old sunken pier.

*Seemle*, that the harbour was not by the statutes vested in the commissioners, but only the works constructed for its improvement.

This case distinguished from *Mersey Docks and Harbour Board Trustees v. Gibbs*, L. R. 1 H. L. 93; *Winch v. The Conservators of the Thames*, L. R. 7 C. P. 458, 9 C. P. 378; *Parnaby v. The Lancaster Canal Co.*, 11 A. & E. 223, and others cited, on the ground that here the harbour was a natural one open

to the public as of right, not an artificial work erected by the defendants, and which they invited the public to use on payment of tolls.

*Held*, also, that under the statute there was no duty imposed upon the defendants to employ the funds placed under their control, and the tolls which they were authorized to impose, in removing the obstruction complained of, which existed before their incorporation, but that a discretion was vested in them not to be controlled by a jury.

*Seemle*, per Burton and Patterson, J.J., the court being empowered to draw inferences of fact, that there was no sufficient evidence to shew knowledge by the defendants that the place in question was dangerous to vessels. *Hood v. The Commissioners of the Harbour of Toronto*, 72.

## TORONTO STREET R. W. CO.

*Assessment of portions of streets used by.*—See ASSESSMENT AND TAXES, 2.

## TRESPASS.

1. *Trespass quare clausum fregit—General issue—Effect of.*—Where the plaintiff declared for a trespass to his land described as being composed of part of lot 10, of which he was and had for a long time been in possession, and the defendants contended that the place where the trespass was committed, though enclosed by the plaintiff, was in fact part of the road allowance, which they were authorized by the corporation to open: *Held*, that this defence was admissible under a plea of not guilty, the question raised by such issue being, whether the defendant had com-



mitted a trespass on the land described. *Weaver v. Hendricks et al.*, 1.

2. *Interpleader—Damages.*—An execution was issued from the Division Court on the 1st February, and received by the bailiff on the 3rd, when the horse in question was seized. The plaintiff having claimed it, an interpleader summons issued, and the trial was fixed for the 3rd March. It was only partly heard on that day; and adjourned on the plaintiff's application. The horse when seized was given by the bailiff, at the plaintiff's request, to one A. who kept it. On the adjournment it was ordered to be given to the plaintiff, on her giving security, and A. gave the security, but kept the horse in his own possession. The interpleader suit was tried on the 7th May, and the plaintiff succeeded in it—after which she brought this action of trespass. *Held*, that she was entitled to recover damages for the detention of the horse down to the 3rd March, until which time A. held it for the bailiff; but not after that time, for the order then made that she should give security, as a condition of getting the horse back, was the act of the Judge, for which defendant was not responsible.

On the 6th February the defendant wrote to the bailiff instructing him not to seize a particular horse mentioned, and they contended that as on receipt of this letter the bailiff should have given the horse up, they were not liable for its further detention. The evidence shewed that the horse seized was not the one mentioned in the letter; but, *Semble*, that if it had been, defendants would still have been liable for the continuance of the wrongful seizure which

they had authorized. *Henry v. Mitchell et al.*, 217.

## WAIVER.

*Of condition precedent.*—See SALE OF GOODS, 2.

*Of condition in policy.*—See INSURANCE.

## WARRANTY.

*Of title on sale of goods.*—See SALE OF GOODS, 3.

## WAYS.

1. *Municipal Corporations—Repair of bridge.*—The decision in this case, reported in 35 U. C. R., 195, affirmed; and the defendants held liable for the want of a railing and protection along the sides of an embankment leading to a bridge, in consequence of which the plaintiffs' horse, being frightened, backed the waggon over it. *Toms et al. v. The Corporation of the Township of Whitby*, 100.

2. *R. W. Co.—Taking gravel from road allowance—Action therefor—Limitation clause—C. S. C. ch. 66, sec. 83.*—The persons constructing a railway took gravel, for the purpose of ballast from a road allowance at or near where the railway crossed it. The pathmaster of the corporation forbid them; and on compensation being demanded from the railway company, their superintendent wrote to the township clerk admitting that they should have got permission before taking it, and asking what damages they expected, saying the company would of course do what

was right. Afterwards they made an offer by way of settlement, which was not accepted.

*Held*, that the company were liable for the trespass: that the plaintiffs could maintain an action therefor; and that the six months' limitation clause, C. S. C., ch. 66, sec. 83, did not apply, the wrong complained of being an illegal act, not necessarily connected with the construction of the railway more than the appropriation of any other property to their use. *Corporation of the Township of Brock v. Toronto and Nipissing Railway Co.*, 372.

3. *Defect in highway—Accident—Proximate cause—Liability of corporation.*]—The plaintiff, with a waggon and load of bricks, was coming down a hill on the road, by the side of a precipice. He had stopped to speak to some one, when on starting again the horses ran away, and when they came to an opening in the fence or railing along the road, near the foot of the hill, they bolted through it, and down the precipice.

At the trial the plaintiff was nonsuited, on the ground that the proximate cause of the accident was the horses getting beyond the plaintiff's control, not the defect in the fence.

*Held*, that the mere fact of the horses running away and becoming unmanageable, would not prevent the plaintiff from recovering, unless he had been guilty of want of reasonable care or skill, which was a question for the jury; and the nonsuit therefore was set aside.

*Toms et ux. v. Corporation of Whitby*, 35 U. C. R. 226, 37 U. C. R. 100, considered. The decisions in the States of Maine, New Hampshire, and Massachusetts reviewed, and

the rule in New Hampshire adopted, as being in accordance with the weight of authority, and with the views expressed in that case.

The rule is, that where two causes combine to produce the injury, both in their nature proximate, the one being the defect in the highway, and the other some occurrence for which neither party is responsible, the corporation is liable, provided the injury would not have been sustained but for the defect in the highway. *Sherwood v. The Corporation of the City of Hamilton*, 410.

4. *Road between townships—Bridge—Duty to repair—Municipal Act of 1873, secs. 413, 416.*]—A stream called Black Creek crosses the road running between the townships of Ellice and Downie, and is crossed by a bridge on that road. It is a stream of from 30 to 40 feet in width, with clearly defined banks. The approaches to this bridge being out of repair, the plaintiff driving there was upset and injured.

Sec. 413 of the Municipal Act enacts that it shall be the duty of county councils to maintain bridges over rivers forming or crossing boundary lines between two municipalities within the county; and sec. 416 provides that in case a road lies wholly or partly between adjoining townships, &c., the councils of the municipalities between which it lies shall have joint jurisdiction over the same, and the said road shall include a bridge forming part of the road.

At the trial the plaintiff was nonsuited, the learned Judge ruling that this was a case within sec. 413, and that the county, therefore, and not the two township corporations, (the defendants) was liable.

*Held*, that whether the Black Creek was a river, within that sec-

tion, was a question of fact, not of law, and that the nonsuit therefore was wrong; and *Seemle*, per HARRISON, C. J., that it was not a river. Secs. 413 and 416 may be read together by taking sec. 416 to declare that the road shall include a bridge forming part of the road for the purposes of that section, except as provided by sec. 413, where the bridge crosses a river. *McHardy v. The Corporation of the Township of Ellice*, 580.

## WORDS.

"Every person convicted."—*Wilde v. Bowen*, 504.

"This agreement."—*Faugher v. Burley*, 498.

"Re-entry—Re-entering."—*Lee v. Lorsch*, 262.

*River.*—*McHardy v. Corporation of Ellice*, 580.







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